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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-911

UNITED STATES OF AMERICA,
Respondent,

vs.

ADAMO WRECKING CO.,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

OPINIONS BELOW.

The opinion of the Sixth Circuit is not yet officially reported. It is unofficially reported at 9 E. R. C. 1443, and is reprinted as Appendix A to the Petition, commencing at page A1.

The opinion of the District Court is unreported, and is reprinted as Appendix B to the Petition, commencing at page A12.

JURISDICTION.

The judgment of the Sixth Circuit was filed November 1, 1976. By Order dated November 24, 1976 (No. A-426), Mr. Justice Stewart extended the time for filing this Petition to and including December 31, 1976. Jurisdiction is conferred upon this Court by 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the Federal courts are compelled to enforce the illegal and unauthorized directives of a Federal Administrator?
2. Whether the Federal courts are compelled to convict citizens for conduct which Congress has not made a crime?

STATUTES AND REGULATIONS INVOLVED.

This case involves Sections 112, 113(c), and 307(b) of the Clean Air Act, as amended. These statutory provisions are codified at 42 U. S. C. §§ 1857c-7, 1857c-8(c), and 1857h-5(b), respectively, and are reprinted in full text in Appendix C to the Petition, commencing at page A48.

This case also involves an administrative regulation promulgated by the United States Environmental Protection Agency on April 6, 1973 (38 Fed. Reg. 8826), codified at 40 C. F. R. § 61.01, *et seq.*, and reprinted as Appendix D to the Petition, commencing at page A52.

STATEMENT OF THE CASE.

On February 20, 1975, a United States Grand Jury for the Eastern District of Michigan returned a 2-count superseding indictment, charging Petitioner with violations of criminal provisions of the Clean Air Act, as amended. The District Court had jurisdiction pursuant to 28 U. S. C. § 1355. On Petitioner's motion, the District Court dismissed the first count of the indictment for failure to allege an offense against the laws of the United States.[1]

Invoking the Court of Appeals' jurisdiction under 18 U. S. C. § 3731, the United States appealed the dismissal. The Sixth Circuit reversed and this Petition seeks review of The Sixth Circuit's decision.

1. As only the first count is involved in this Petition, it will hereinafter for convenience be referred to as "the indictment".

The indictment charged a violation of Section 112(c) of the Clean Air Act as amended (42 U. S. C. § 1857-7(c)(1)(B)), criminal penalties for which are provided by Section 113 (42 U. S. C. § 1857c-8(c)). Section 112(c), in pertinent part provides:

> "(1) After the effective date of any emission standard under this section—
>
> • • • • •
>
> (B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard. . . ."

The theory of Petitioner's motion to dismiss, accepted by the District Court, was that the indictment failed to allege an offense because it charged violation of an EPA regulation which, while denominated "Emission Standard," was not in substance an emission standard within the meaning of Section 112. This regulation, as applied to Petitioner's business—demolition—specifies a work practice or methodology to be followed in demolishing buildings containing friable asbestos materials (see 40 C. F. R. § 61.22(d), Appendix, pp. A55-7).

It is undisputed that asbestos is a "hazardous air pollutant" within the meaning of Section 112, and also undisputed that the Act requires promulgation of an emission standard for its control:

> ". . . the Administrator *shall* prescribe an emission standard for such pollutant. . . ." Section 112(b)(1)(B) (emphasis supplied).

The District Court analyzed the legislative history and the Act as a whole (Appendix, pp. A36-A40), and concluded (Appendix, p. A40) that Congress had clearly created a statutory scheme by which emission standards were to be *implemented* by techniques for controlling emissions. Accordingly, he held that an emission standard cannot be the same thing as a technique for controlling emissions which might be used to

implement an emission standard. Since Petitioner was accused of violating a regulation which only mandated a technique for emission control, the District Court ruled that Petitioner was not charged with violating an "emission standard" within the meaning of Section 112 of the Act and dismissed the indictment for failure to charge an offense against the laws of the United States.

The Sixth Circuit reversed, noting that the demolition work practice rule could have been but was not brought before the District of Columbia Circuit by petition for review filed within 30 days of promulgation, as provided by Section 307(b)(1). The Court of Appeals held that jurisdiction to decide whether the regulation was an emission standard within the meaning of the statute making it a crime to violate an emission standard (the charge against Petitioner) was withheld from the District Court by Section 307(b)(2) of the Act (42 U. S. C. § 1857h-5(b)(2)):

> "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

The Court of Appeals did not comment upon Congress' policy decision that the Administrator should *not* make judgments as to how stationary sources should be operated, but rather should only specify the results to be achieved and let the responsible business people determine how best to achieve them —See, S. Rep. No. 91-116, at page 17 (91st Congress, 2d Sess., Sept. 17, 1970). The Court did not acknowledge the distinction between mandating an end product—quantitatively regulated emissions—and methods for achieving the required result (Compare *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F. 2d 1, n. 14 at 11 (D. C. Cir., 1976), *cert. denied*, ____ U. S. ____, 96 S. Ct. 2662 (June 14, 1976)). The Court ignored the fact that the Administrator is *required* by Section 112 to prescribe an emission standard and has *no*

statutory authority under any circumstance to substitute a different kind of regulation, even though such alternative authority is provided in other sections of the Act dealing with other types of emission sources (See *Ethyl Corp.* v. *E. P. A., supra*).

Finally, the Court ignored the Administration's own admissions that a work practice rule is not an "emission standard." Thus, the Administration itself unsuccessfully sought an amendment to the Clean Air Act which would have authorized design or equipment standards under circumstances where limitations upon measurement methodology make the use of an emission standard "infeasible." (Proposals submitted by the Ford Administration January 30, 1975, to amend the Clean Air Act and the Energy Supply and Environmental Coordination Act, 5 BNA Environmental Reporter, Current Developments 1572, 1574 (Feb. 7, 1975)).

In short, the Sixth Circuit held that, if the authority of Section 112 is purportedly invoked to issue a regulation titled "Emission Standard" and if no petition to review is filed in the District of Columbia Circuit within 30 days, the District Courts have no choice but to enforce the regulation, regardless of its substantive content.

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

The Sixth Circuit Improperly Decided an Important Question of Federal Law Which Has Not Been but Should Be Settled by This Court.

Since the Administrator is authorized to promulgate only emission standards, he has violated not only his specific statutory mandate but also the clear intent of Congress by promulgating this work practice regulation. Phrased another way, the Administrator's conduct is illegal and the work practice regulation is invalid on its face.

The Sixth Circuit's mistaken view that § 307(b)(2) prohibits a District Court from so holding results in nothing less than tyranny. The effect of the decision below is that unless the unauthorized regulation is challenged by a petition to review filed in the District of Columbia Circuit within 30 days, a District Court has no alternative but to make a private citizen a criminal for conduct which is not a crime. Indeed, the Sixth Circuit has held that Federal courts must make private citizens criminals for failing to comply with directives of their own Government which are themselves illegal. The EPA Administrator is himself in continuing violation of the Act for his failure to promulgate an emission standard. Under the decision below, his illegal conduct now has the force of law and his invalid regulation must be followed at the risk of criminal conviction.

We respectfully submit that § 307(b)(2) is not meant to and must not be construed to permit such a result. The Federal Courts cannot be left with no choice but to enforce a regulation which is invalid on its very face and punish those who have not complied with an illegal directive. Clearly, this Court's supervisory power should be invoked to review the Sixth Circuit's decision.

II.

The Decision Below Conflicts With Decisions of This Court and of Other Circuits.

The principal citation of authority contained in the Sixth Circuit's opinion is *Yakus* v. *United States*, 321 U. S. 414 (1944) (Appendix, pp. A8-A9). But that case does not support the court below. Moreover, the court ignored later, controlling decisions of this Court and other circuits.

As the Sixth Circuit noted, *Yakus* upheld the validity of a so called "withdrawal" provision somewhat similar in import to § 307(b)(2). Yet the court either ignored or failed to comprehend the fact that *Yakus* did not decide and indeed specifically exempted from the scope of its holding a situation where the regulation is challenged as *facially* invalid (321 U. S., at pp. 446-7). Since this work practice regulation is similarly invalid on its face, the *Yakus* decision not only fails to support the Sixth Circuit's decision, it is indeed contrary authority.

In addition, the court below either ignored or failed to comprehend the import of this Court's decision in *Leedom* v. *Kyne*, 358 U. S. 184 (1958) and the Fifth Circuit's holding in *Manges* v. *Camp*, 474 F. 2d 97 (5th Cir., 1973). In *Leedom* v. *Kyne*, this Court clearly recognized and held that an Administrator's illegal conduct can be challenged, notwithstanding that the challenge is prohibited by the relevant statute. As this Court stated:

> ". . . *This suit is not one to 'review', in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction.* Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." (358 U. S. at 188, emphasis supplied.)

In *Manges* v. *Camp*, the Fifth Circuit reversed a trial court holding that there was no jurisdiction to entertain an "out-of-time" challenge to an unauthorized administrative order be-

cause the statute contained a withdrawal provision indistinguishable from, if not stronger than § 307(b)(2). Citing this Court's decisions in *Oestereich* v. *Selective Service System*, 393 U. S. 233 (1968) and *Breen* v. *Selective Service System*, 396 U. S. 460 (1970), the Fifth Circuit held that the Order could nonetheless be challenged, stating:

> ". . . *if the Comptroller was not acting within his authority* granted by Congress, then 12 U. S. C. § 1818(i) [the withdrawal provision] could not withdraw jurisdiction." (474 F. 2d at p. 99, emphasis supplied).

As the Fourth Circuit has held:

> "The courts have always been able to fashion remedies to prohibit agency action in violation of a statutory requirement, if a failure of enforcement would occasion a defeat of the apparent Congressional purpose." (*Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856, 862-3 (4th Cir. 1961))

It is all but impossible to comprehend how the court below could dismiss the foregoing cases as "inapposite" and "unpersuasive" (Appendix, A10, A11). Obviously, they stand for the proposition that Federal courts must not condone and enforce unauthorized and illegal administrative action. Rather, such conduct can and must be challenged, "withdrawal" provision notwithstanding, lest our government by law be replaced by a government of men who ignore the law except to use it as they alone see fit.

Petitioner was charged with conduct which is not a crime. It was charged with violating a regulation which is titled an "emission standard" but is not an emission standard. It was charged with violating a regulation which exceeds the scope of the Administrator's authority, which violates his statutory mandate and which is in direct contravention to Congressional intent. Petitioner was charged with violating a regulation which is illegal and invalid on its very face.

Unless review is granted, Federal courts will be stripped of their power to review the Administrator's lawless conduct and will be compelled to enforce illegal directives and regulations at the expense of justice and fair play. Thus, citizens will become criminals because they do not follow illegal directives. We respectfully submit that this cannot be allowed.

CONCLUSION.

For each and all of he foregoing reasons, Petitioner respectfully prays that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

No. 75-1967

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ADAMO WRECKING CO.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed November 1, 1976.

Before: PHILLIPS, *Chief Judge*, EDWARDS and PECK, *Circuit Judges.*

EDWARDS, *Circuit Judge*. The United States appeals from dismissal without trial of a criminal indictment against defendant Adamo Wrecking Company. The first issue presented by this case is whether or not either the District Court or this court had or has jurisdiction to review an "emission standard" adopted as a regulation under the Clean Air Act, 42 U. S. C. § 1857 (1970). The second issue (if it is reached) is whether or not 40 C. F. R. § 61.22 (1975), which is quoted below, is or is not "an emission standard" within the meaning of 42 U. S. C. § 1857c-7 (1970):

> § 61.22 Emission Standard . . .
>
> (d) Demolition: Any owner or operator of a demolition operation who intends to demolish any institutional,

commercial, or industrial building (including apartment buildings having more than four dwelling units), structure, facility, installation, or portion thereof which contains any boiler, pipe, or load-supporting structural member that is insulated or fireproofed with friable asbestos material shall comply with the requirements set forth in this paragraph.

• • •

(2) The following procedures shall be used to prevent emissions of particulate asbestos material to outside air:

(i) Friable asbestos materials, used to insulate or fireproof any boiler, pipe, or load-supporting structural member, shall be wetted and removed from any building, structure, facility, or installation subject to this paragraph before wrecking of load-supporting structural members is commenced. Boilers, pipe, or load-supporting structural members that are insulated or fireproofed with friable asbestos materials may be removed as units or in sections without stripping or wetting, except that where the boiler, pipe, or load-supporting structural member is cut or disjointed, the exposed friable asbestos materials shall be wetted adequately to insure that such debris remains wet during all stages of demolition and related handling operations. 40 C. F. R. § 61.22(d)(2)(i) (1975).

The importance of the emission standard question becomes obvious when we consider three provisions of the Clean Air Act. The first provision makes any violation of an emission standard a criminal act. *See* Section 113 (42 U. S. C. § 1857c-8(c)). The second provides:

> (c)(1) After the effective date of any emission standard under this section—
>
> • • •
>
> (B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard. . . . Section 112(c)(1)(B) of the Act, 42 U. S. C. § 1857c-7(c)(1)(b) (1970).

The third provision provides for petitions for "review of action of the Administrator in promulgating" any emission standard under "§ 1857c-7" to be "filed only in the United States Court of Appeals for the District of Columbia" within specified time limits, and flatly prohibits "judicial review in . . . criminal proceedings for enforcement. Section 307(b) of the Clean Air Act, 42 U. S. C. § 1857h-5(b)(1970), provides in full:

> (b)(1) *A petition for review of action of the Administrator in promulgating* any national primary or secondary ambient air quality standard, *any emission standard under section 1857c-7 of this title,* any standard of performance under section 1857c-6 of the title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under section 1857f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title, or any standard under section 1857f-9 of this title *may be filed only in the United States Court of Appeals for the District of Columbia.* A petition for review of the Administrator's action in approving or promulgating any implementation plan under 1857c-5 of this title or section 1857c-6(d) of this title, or his action under section 1857c-10(c)(2) (A), (B), or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> *(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.* (Emphasis added.)

We must consider still another portion of this record before we can turn toward a reasoned decision. The dismissed first count[1] of the indictment read:

> COUNT ONE
>
> On or about the 19th day of February, 1974, at 2612 Carter Street, also known as 8751 Linwood Street, in the

1. The second count of the indictment which alleges a false report is not involved in this appeal.

> City of Detroit, County of Wayne, within the Eastern District of Michigan, ADAMO WRECKING COMPANY, the defendant herein did knowingly cause the emission of asbestos from a four and one-half story commercial masonry building at the aforementioned location by failing to wet and remove firable [sic] [friable] asbestos material, used to insulate and fireproof a boiler in the basement of said building, before demolition of the load-supporting structural supports had begun; in violation of Title 42, United States Code, Section 1857c-7(c)(1)(B), and the rules and regulations promulgated thereto, 38 F. R. 8829 (April 6, 1973), 40 C. F. R. § 61.22(d)(2)(i).

Appellee phrases the appellate question in this case as follows:

> Whether the trial court correctly dismissed Count I of the superseding indictment for its incurable failure to allege an essential element of the crime purportedly charged therein.

Plainly, however, the indictment does charge that defendant Adamo "did knowingly cause the emission of asbestos" by failing to wet friable asbestos before demolition. Hence appellee's question only makes sense when its brief explains that it does not consider the regulation, 40 C. F. R. § 61.22 to be "an emission standard" within the meaning of the Act. And, indeed, the District Judge found that 40 C. F. R. § 61.22 was not an emission standard.

Before turning to his reasons for taking that point of view, however, we note that preliminary thereto he rejected appellee's argument that the indictment was facially defective in failing to charge an essential element:

> Inasmuch as there is no particular magic in the use of verbatim statutory language, it is not a requisite for sufficiency. As the Sixth Circuit explained in *Rudin* v. *U. S.*, 254 F. 2d 45, 48 (1958), cert. den. 357 U. S. 930:
>
> > "It is, of course, settled law that in order for an indictment to be valid it must allege all the elements which are necessary to constitute a violation of the statute.

> > *But it is not necessary that the indictment follow the exact wording of the statute.* (Emphasis added.)

The test is whether the language used "plainly describes each element," (*Glenn* v. *U. S.*, 303 F.2d 536, 538 (5th Cir. 1962), cert. den. 372 U.S. 920) so that is apprises defendant of what he must be prepared to meet (*Rudin, supra,* at 48). In the words of one recognized commentator:

> "The fundamental purpose of the pleading is to inform the defendant of the charge so that he may prepare his defense, and the test for sufficiency ought to be whether it is fair to defendant to require him to defend on the basis of the charge as stated in the particular indictment • • •. The stated requirement that every ingredient or essential element of the offense should be alleged must be read in the light of the fairness test just suggested. (*Wright, supra,* § 125, at 233-4; see also *U. S.* v. *Berlin, Richman and Denmon, supra,* in support of that basic test.)"

The instant indictment fulfills that function. Rather than simply adverting to the statute, it virtually quotes the regulation which embodies the standard. In so doing, it alleges that the emission charged is traceable to a violation of the standard, more specifically, to a failure to wet and remove the material as a prelude to demolition.

The indictment charges that defendant:

> "• • • did knowingly *cause the emission of asbestos* from a four and one-half story commercial masonry building at the aforementioned location *by failing to wet and remove firable* [*sic*] [*friable*] asbestos material, used to insulate and fireproof a boiler in the basement of said building, *before demolition* of the load-supporting structural supports *had begun* • • •" (Emphasis added).

The emission charged is directly attributable to the failure to wet and remove the asbestos prior to demolition. The indictment alleges that defendant caused the emission *by* failing to wet and remove "before demolition had begun." Use of the tense "had begun" indicates that demolition was commenced thereafter. Thus, the substance of the element

is present, in some detail. Substitution of the more specific language of a regulation intended to define a statutory term, in the place of that term, is certainly adequate to apprise defendant of the charge and the nature of the cause against it. (*Russell, supra, U. S.* v. *Marra,* 481 F.2d 1197 (6th Cir. 1973)).

In reaching its decision, this Court does not perceive any conflict with the analysis adopted by prior judicial determinations.[9] In the cases relied upon by defendant, the indictments not only failed to state the key statutory terminology, but also failed to correct the omission with other acceptable language. Thus, the courts felt confronted by the need to presume one essential element from allegations of another. Such a presumption is not required in the instant case, inasmuch as the element may be found within the four corners of the indictment. Accordingly, defendant's argument to the contrary must be rejected.

We agree with this reasoning and adopt it for the purposes of this appeal.

The District Judge next turned to consideration of the government's claim that Section 307(b) of the Act (42 U. S. C. § 1857h-5) deprived the District Court of jurisdiction to entertain the present attack upon the regulation. Finding in Section 307(b) an ambiguity which he resolved in favor of jurisdiction, the District Judge proceeded to examine the regulation and to hold it invalid.

We disagree with the District Judge's conclusion as to jurisdiction and hence we have no need to deal with validity of the emission standard.

The District Judge reasoned that the word "promulgating" may be read as applying more to procedure than to substance and hence that the prohibition on review of an emission standard under Section 307(b)(2) does not prohibit an attack on the

9. Similar challenges have been posed successfully in: *U. S.* v. *Nat. Wrecking Co.,* 74 CR 755 (N. D. Ill. 1975); *U. S.* v. *Nardi Wrecking Co.,* 74 CR 756 (N. D. Ill. 1975); *U. S.* v. *Harvey Wrecking Co.,* 74 CR 758 (N. D. Ill. 1975); *U. S.* v. *Brandenberg Demolition Co.,* 74 CR 757 (N. D. Ill. 1975), hereinafter "Illinois cases."

validity of the standard as opposed to an attack upon the procedures by which it was enacted.

The construction adopted by the District Judge appears to us to raise more questions than it answers. If review of the substance of national emission standards is not provided for in § 307(b)(1) where is it provided for? Would Congress have intended to leave review of the validity of a national emission standard to District Court enforcement proceedings in fifty states with the high probability of many conflicting interpretations? Why would Congress ban review of procedure in District Court enforcement proceedings and allow District Court review of substance when clearly the latter is more likely to occasion a greater diversity of District Court opinions and a consequent greater confusion concerning the meaning of the standard and its enforcement? We find no satisfactory answer to these questions under the District Judge's interpretation.

On the other hand, we believe that the language "action of the Administrator in promulgating" can more readily be taken to apply to both the procedures by which it was adopted and the substance of the regulation. This clearly is the view taken of the matter by the D. C. Circuit in *Oljato Chapter of the Navajo Tribe* v. *Train,* 515 F. 2d 654 (D. C. Cir. 1975), where that court rejected a distinction between agency action and the standard itself and held that an attack upon the standard itself "can be brought only in this court under Section 307(b)(1) of the Clean Air Act. . . ." *Oljato Chapter of Navajo Tribe* v. *Train, supra* at 656, 659.

The United States Court of Appeals for the D. C. Circuit also said:

> Unlike cases like *Functional Music* where a party may challenge a specific application of an invalid rule, this case involves a general out-of-time challenge to the validity of an EPA standard, exactly what Congress intended to bar by limiting appeals (absent new information) to within 30 days of the rule's promulgation. Section 307(b)(1), 42 U.S.C.A. § 1857h-5(b)(1). Such limits are

very common in judicial review statutes. *See, e. g.*, 15 U.S.C. § 78y (1970) (Securities & Exchange Commission); *id.*, § 45(c) (Federal Trade Commission); 16 U.S.C. § 825*l* (1970) (Federal Power Commission); 49 U.S.C. § 1486(a) (1970) (Federal Aviation Administration). Indeed, in the Clean Air Act the Congress was particularly concerned with rapid review of the promulgated standards, and so imposed the especially short 30-day filing period (the above cited statutes all allow 60 days) "[i]n order to maintain the integrity of the time sequences provided throughout the Act * * *." S. Rep. No. 91-1196, 91st Cong., 2d Sess., at 41 (1970). *Oljato Chapter of Navaho Tribe* v. *Train, supra* at 659 fn. 6.

Two other Circuits have also specifically applied the exclusive review provision of 307(b)(2)—albeit not in the setting of a criminal case: *Getty Oil Company (Eastern Operations), Inc.* v. *Ruckelshaus*, 467 F. 2d 349 (3d Cir. 1972), *cert. denied*, 409 U. S. 1125 (1973); *Union Electric Co.* v. *Environmental Protection Agency*, 515 F. 2d 206, 220 (8th Cir. 1975), *aff'd* ____ U. S. ____ (1976) (44 U. S. L. W. 5060) (U. S. June 25, 1976). *See also City of Highland Park* v. *Train*, 519 F. 2d 681 (7th Cir. 1975), *cert. denied*, ____ U. S. ____ (1976).

More important still, the United States Supreme Court long ago upheld the exact sort of exclusivity in review here involved, although in the context of another regulatory act. In *Yakus* v. *United States*, 321 U. S. 414 (1944), the Court said:

> As we have seen, Congress, through its power to define the jurisdiction of inferior federal courts and to create such courts for the exercise of the judicial power, could, subject to other constitutional limitations, create the Emergency Court of Appeals, give to it exclusive equity jurisdiction to determine the validity of price regulations prescribed by the Administrator, and foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation.
>
> Unlike most penal statutes and regulations whose validity can be determined only by running the risk of violation,

> see *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163, the present statute provides a mode of testing the validity of a regulation by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. This was recognized in *Bradley* v. *Richmond, supra*, and in *Wadley Southern Ry. Co.* v. *Georgia, supra*, 667, 669, and has never been doubted by this Court. And we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue. *Yakus* v. *United States, supra*, at 443-44.

It should be noted that *Yakus*, like our instant appeal, was decided in the context of a criminal prosecution and involved an exclusive right of review statute. By its terms it is obvious that the Administrator issued the disputed regulation under § 112(b) of the Act. *See* 36 Fed. Reg. 23239 (1971); 38 Fed. Reg. 8820 (1973). Section 112(b) deals only with "National emission standards." Further, the disputed regulation is entitled an "emission standard."[2]

We do not believe that there is anything vague, ambiguous, or difficult to interpret in the prohibition of Section 307(b):

2. We note, of course, that appellee claims that no matter what the Administrator called this regulation, it was a "work practice" standard rather than an "emission standard." We see nothing inconsistent with the purposes of this statute in the Administrator's promulgation of a "work practice" as a condition of an emission standard which, absent fulfillment of the work practice conditions, otherwise prohibits any emission of particulate asbestos material into the ambient air.

> A petition for review of action of the Administrator in promulgating . . . any emission standard under section 1857c-7 of this title . . . may be filed only in the United States Court of Appeals for the District of Columbia. Section 307(b) Clean Air Act, 42 U.S.C. § 1857h-5(b) (1970).

Its intent could hardly be more obvious.

Legislative history of the Clean Air Act supports the interpretation of Section 307(b) which we have set out above. The question of judicial review was considered only in the Senate. The Senate Report, S. Rep. No. 91-1196, 91st Cong., 2d. Sess:, 40-42 (1970), noted that review of emission standards was placed in the D. C. Circuit to assure "even and consistent national application" of the standards. The 30-day time limit for review was established "to maintain the integrity of the time sequences provided throughout the Act. . . ."

As we see this record, there is no doubt that appellant could have challenged the standard through the procedure outlined in Section 307(b)(1) had it chosen to do so.

We recognize, of course, that appellee relies strongly upon four District Court cases from the Northern District of Illinois: *United States* v. *National Wrecking Co.*, No. 74 CR 755 (N. D. Ill., Dec. 20, 1974); *United States* v. *Nardi Wrecking Co.*, No. 74 CR 756 (N. D. Ill. Jan. 2, 1975); *United States* v. *Harvey Wrecking Co.*, No. 74 CR 758 (N. D. Ill. Jan. 7, 1975); *United States* v. *Brandenburg Demolition, Inc.*, No. 74 CR 757 (N. D. Ill. Jan. 31, 1975). Although some of these cases contain dicta which support the appellee's point of view on the jurisdiction issue, the decisions were actually based upon failure of the indictments to charge emission of a prohibited pollutant. As noted above, the indictment in our instant case clearly did charge such an emission; and we find the dicta unpersuasive.

Leedom v. *Kyne*, 358 U. S. 184 (1958), relied upon by the appellee is, we believe, inapposite. There was no similar

prompt, exclusive review procedure provided in that case; and the facts showed that the NLRB "attempted an exercise of power that had been specifically withheld." *Leedom* v. *Kyne*, *supra* at 189.

As to *Manges* v. *Camp*, 474 F. 2d 97 (5th Cir. 1973), we consider it distinguishable on its facts and unpersuasive in any possible application to this appeal. We do not find in this record any "clear departure from statutory authority." *Manges* v. *Camp.*, *supra* at 99.

No constitutional issues were decided by the District Judge or are properly before us in this appeal. Under what we have said above, we hold that the District Judge was in error in finding that he had jurisdiction to determine the validity of the disputed asbestos emission regulation and in dismissing the indictment.

The judgment of the District Court is reversed and the case is remanded to the District Court for further proceedings.

APPENDIX B.

UNITED STATES DISTRICT COURT.
Eastern District of Michigan,
Southern Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ADAMO WRECKING COMPANY,
Defendant.
} Criminal No. 5-80297

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNT I AND HOLDING A DECISION AS TO COUNT II IN ABEYANCE.

I.

Defendant, Adamo Wrecking Company, is charged in a superseding indictment with violating the Clean Air Act of 1970,[1] in connection with the demolition of a building at 2612 Carter, Detroit, Michigan. Count I alleges that defendant did "knowingly cause the emission of asbestos" before demolition of the structure, in violation of 42 U. S. C. § 1857c-7(c)(1)(B), and 40 C. F. R. § 61.22(d)(2)(i).[2] Count II alleges

1. The pertinent provision of that Act provides:
"After the effective date of any emission standard under this section—
(B) • • • no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard • • •"

2. 40 C. F. R. § 61.22 provides:
"(d) Demolition: Any owner or operator of a demolition operation who intends to demolish any institutional, commer-

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that defendant knowingly made false statements concerning the existence of friable asbestos materials at the demolition site, in violation of 42 U. S. C. § 1857c-8(c)(2) and 40 C. F. R. § 61.22(d)(1).

Defendant moves, pursuant to Federal Rule of Criminal Procedure 12(b), to dismiss both counts on the grounds:

1. That the indictment fails to allege an essential element of the offense; to-wit, emission of pollutants in violation of an emissions standard;

2. That even if the indictment is deemed facially sufficient in that respect, it fails to allege an emission in violation of a standard because 40 C. F. R. § 61.22(d) does not constitute an "emission standard";

3. That the indictment fails to charge an offense because the government is unable to produce evidence of a prohibited emission;

4. That the indictment is impermissibly vague and unspecific in that it is premised on a "work practice" as opposed to a standard, fails to specify a subsection of § 1857c-7, and is based on an unconstitutionally vague regulation, namely, 40 C. F. R. § 61.22(d);

5. The indictment fails to charge an offense because the Administrator exceeded his statutory authority;

(Continued from preceding page)

cial, or industrial building (including apartment buildings having more than four dwelling units), structure, facility, installation, or portion thereof which contains any boiler, pipe, or load-supporting structural member that is insulated for fireproofed with friable asbestos material shall comply with the requirements set forth in this paragraph.

(2) The following procedures shall be used to prevent emissions of particulate asbestos material to outside air:

(i) Friable asbestos materials, used to insulate or fireproof any boiler, pipe, or load-supporting structural member, shall be wetted and removed from any building, structure, facility, or installation subject to this paragraph before wrecking of load-supporting structural members is commenced."

6. That it is defective because there is no "emissions standard" as required by 42 U. S. C. § 1857c-7c-7(b)(1)(B);

7. That it fails to charge an offense in that 40 C. F. R. § 61.22 is an unauthorized dictate of the method by which buildings are to be demolished.

Defendant attacks the validity of Count II on the ground that 40 C. F. R. § 61.22 is unauthorized and that there can be no knowing failure to report an activity which is described by statute in an unconstitutionally vague manner.

The government responds, contesting both the merits of the motion and the jurisdiction of this Court to entertain the motion under 42 U. S. C. §1857h-5(b)(1) and (2). In view of the jurisdictional assertions by the government, this Court must consider its power to hear each of defendant's contentions. Thus, the Court will first direct its attention to those arguments which are clearly within its purview (Part II). It will then proceed to evaluate, insofar as necessary, the remainder of the claims concerning Count I in both a jurisdictional (Part III) and substantive (Part IV) framework. Defendant's challenges to Count II will be discussed, in a limited sense, in Part V.

II.

The jurisdictional limitations of § 1857h-5 apply only to judicial review of "actions of the Administrator in promulgating an emissions standard." Thus, § 1857h-5 does not, in any sense, curtail this Court's jurisdiction to judge purely facial challenges to an indictment. Consequently, the Court may proceed to the merits of three of defendant's arguments: that the indictment omits an allegation of violation of the standard; that the indictment should be dismissed for insufficient evidence; and that it fails to state a particular subsection of § 1857c-7. It is perhaps prudent at the outset to note that the Court cannot perceive the relevance of these arguments to Count II[3]

3. Count II charges failure to file written notice of intention to demolish a structure containing asbestos, in accordance with 42

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of the indictment; and therefore, its discussion refers only to Count I.

A. *Failure to Allege Violation of Standard.*

Defendant argues that the indictment is fatally defective in that it fails to allege an essential element of the offense, namely, an emission in violation of a standard. Defendant is correct in its insistence that such an allegation is necessary, for it is well-settled that:

> "An indictment is required to set forth the elements of the offense sought to be charged. 'The true test of the sufficiency of the indictment is * * * whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet.'" (*U. S.* v. *Debrow*, 346 U.S. 374, 376 (1953); *U. S.* v. *Russell*, 369 U.S. 749 (1961); *U. S.* v. *Levinson*, 405 F.2d 971 (6th Cir. 1968).)

The instant offense consists of the emission of asbestos in violation of an emission standard, as provided in § 1857c-7:

> "(c)(1) After the effective date of any emission standard under this section - - -
>
> * * * * *
>
> (B) No air pollutant to which such standard applied may be *emitted* * * * *in violation of such standard.* * * * *"

40 C. F. R. § 61.22(d)(2)(i) states the applicable standard:[4]

> "Friable asbestos materials used to insulate or fireproof * * * shall be wetted and removed from any * * * structure

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U. S. C. § 1857c-8(c)(2) and 40 C. F. R. § 61.22(d)(1). As such, it is not related to a failure to allege emission in violation of a standard under 42 U. S. C. § 1857c-7, failure to state a subsection of 1857c-7, or insufficient evidence of prohibited emission. Even were the Court to invalidate Count I on those grounds, the government could still proceed on Count II.

4. Defendant vigorously asserts that the within quoted regulation is not a "standard." However, that argument is not relevant to the contention that the indictment fails to say "in violation of a standard" and will be considered separately, infra.

> * * * before wrecking of load-supporting structural members is commenced.* * *"

Thus, Count I of the indictment must allege both the element of emission[5] and violation of the standard. The latter allegation is conspicuously absent, in those terms. However, the Court does not view that omission as a fatal defect.

While an indictment must set forth each essential element in an intelligible manner, the standard for judging its sufficiency is governed by Federal Rule of Criminal Procedure 7(c), which provides, inter alia:

> "The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged * * *. It need not contain * * * any other matter not necessary to such statement. * * *"

Thus, the measure of sufficiency is not overly technical:

> "Although an indictment is subject to careful examination * * * not all lapses from precision and correctness require that an indictment be quashed." (*U. S.* v. *Levinson, supra,* at 977.)

In judging the existence of essential elements, courts have generally looked to the substance, rather than the form, of the indictment. Quotation of statutory language suffices only if it is clear and meaningful (*U. S.* v. *Carll,* 105 U. S. 611 (1881)). An indictment must, therefore, compensate for imprecise, overbroad, or generic aspects of the statute. (See, e.g. *U. S.* v. *Cruikshank,* 92 U. S. 542, 558 (1875); *Morissette* v. *U. S.,* 342 U. S. 246 (1951); *U. S.* v. *Russell, supra*). Thus, an allegation that defendant was in violation of the standard, without more, though taken from the statute, might well be inadequate to apprise defendant of the nature of a necessary element.[6]

5. Defendant concedes that "emission" is properly alleged, and confines its argument to the failure to allege violation of a standard.

6. Even in combination with an allegation that defendant was "in violation of 40 C. F. R. § 61.22," the indictment would be a subject of concern. (See *U. S.* v. *Denmon,* 483 F. 2d 1093 (8th Cir. 1973).)

Inasmuch as there is no particular magic in the use of verbatim statutory language, it is not a requisite for sufficiency. As the Sixth Circuit explained in *Rudin* v. *U. S.,* 254 F. 2d 45, 48 (1958), cert. den. 357 U. S. 930:

> "It is, of course, settled law that in order for an indictment to be valid it must allege all the elements which are necessary to constitute a violation of the statute. ***But it is not necessary that the indictment follow the exact wording of the statute.***[7] (Emphasis added).

The test is whether the language used "plainly describes each element," (*Glenn* v. *U. S.,* 303 F. 2d 536, 538 (5th Cir. 1962), cert. den. 372 U. S. 920) so that it apprises defendant of what he must be prepared to meet (*Rudin, supra,* at 48). In the words of one recognized commentator:

> "The fundamental purpose of the pleading is to inform the defendant of the charge so that he may prepare his defense, and the test for sufficiency ought to be whether it is fair to defendant to require him to defend on the basis of the charge as stated in the particular indictment * * *. The stated requirement that every ingredient or essential element of the offense should be alleged must be read in the light of the fairness test just suggested. (*Wright, supra,* § 125, at 233-4; see also *U. S.* v. *Berlin, Richman and Denmon, supra,* in support of that basic test)."

The instant indictment fulfills that function. Rather than simply adverting to the statute, it virtually quotes the regulation which embodies the standard. In so doing, it alleges that the emission charged is traceable to a violation of the standard, more specifically, to a failure to wet and remove the material as a prelude to demolition.[8]

7. See also *Dunbar* v. *U. S.,* 156 U. S. 185, 190 (1894); *U. S.* v. *Behrman,* 258 U. S. 280 (1921); *U. S.* v. *Richman,* 369 F. 2d 465 (7th Cir. 1966); *U. S.* v. *Berlin,* 472 F. 2d 1002 (2nd Cir. 1973).

8. Importantly for these purposes, the validity of the regulatory scheme is assumed. Therefore, the pertinent allegation is that the

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The indictment charges that defendant:

> "* * * did knowingly *cause the emission of asbestos* from a four and one-half story commercial masonry building at the aforementioned location *by failing to wet and remove friable asbestos* material, used to insulate and fireproof a boiler in the basement of said building, *before demolition* of the load-supporting structural supports *had begun.* * * *" (Emphasis added).

The emission charged is directly attributable to the failure to wet and remove the asbestos prior to demolition. The indictment alleges that defendant caused the emission *by* failing to wet and remove "before demolition had begun." Use of the tense "had begun" indicates that demolition was commenced thereafter. Thus, the substance of the element is present, in some detail. Substitution of the more specific language of a regulation intended to define a statutory term, in the place of that term, is certainly adequate to apprise defendant of the charge and the nature of the cause against it. (*Russell, supra, U. S.* v. *Marra,* 481 F. 2d 1197 (6th Cir. 1973).

In reaching its decision, this Court does not perceive any conflict with the analysis adopted by prior judicial determinations.[9] In the cases relied upon by defendant, the indictments not only failed to state the key statutory terminology, but also failed to correct the omission with other acceptable language. Thus, the courts felt confronted by the need to presume one essential element from allegations of another. Such a presumption is not required in the instant case, inasmuch as the element may be found within the four corners of the indictment. Accordingly, defendant's argument to the contrary must be rejected.

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emission was in *violation* of the standard allegation of a particular level or amount of emission is not required for purposes of this argument.

9. Similar challenges have been posed successfully in: *U. S.* v. *Nat. Wrecking Co.,* 74 CR 755 (N. D. Ill. 1975); *U. S.* v. *Nardi Wrecking Co.,* 74 CR 756 (N. D. Ill. 1975); *U. S.* v. *Harvey Wrecking Co.,* 74 CR 758 (N. D. Ill. 1975); *U. S.* v. *Brandenberg Demolition Co.,* 74 CR 757 (N. D. Ill. 1975), hereinafter "Illinois cases."

B. *Insufficient Evidence.*

Defendant argues that the indictment should be dismissed on the ground that the government has insufficient evidence to proceed to trial. In particular, it argues that since there has been a failure to promulgate an "emissions standard," there can be no evidence of a prohibited emission. In addition, it simply asserts a dearth of evidence. To the extent that the argument relies upon the validity of the regulation it will be considered separately. To the extent that it is premised upon insufficient evidence, it is devoid of merit. It is well-settled that presentation of incompetent, illegal, or insufficient evidence to the grand jury does not constitute grounds for dismissal of an indictment. (*Costello* v. *U. S.,* 350 U. S. 359 (1955); *Lawn* v. *U. S.,* 355 U. S. 339 (1957); *U. S.* v. *Blue,* 384 U. S. 251 (1965); *U. S.* v. *Calandra,* 414 U. S. 328 (1974).) Nor does a claim that evidence sought to be used at trial is illegal suffice. (*U. S.* v. *Blue, supra.*) It follows, then, that a defendant in a criminal case may not challenge an indictment on the ground that it is not supported by adequate evidence. (*U. S.* v. *Birmingham,* 454 F. 2d 706 (10th Cir. 1971), cert. den. sub nom, *Chiles* v. *U. S.,* 406 U. S. 969; *U. S.* v. *Kysar,* 459 F. 2d 422 (10th Cir. 1972).)

C. *Failure to Specify Statutory Section.*

Defendant contends that the indictment does not specify a subsection of 42 U. S. C. § 1857c-7. However, Count I refers to the section with as much particularity as possible: It alleges a "violation of Title 42, United States Code, Section 1857c-7(c)(1)(B)." Therefore, defendant's argument is without merit.

III.

In light of the inability of this Court to resolve defendant's motion on the foregoing contentions, it must address the remainder of its challenges to the indictment. The first inquiry, of

course, is as to the jurisdiction of this Court to consider the balance of the claims.

Defendant's attack on Count I of the indictment is three-fold.[10] It argues:

1. That the indictment fails to allege the element of violation of an emission standard because 42 C. F. R. § 61.22(d) is not a viable standard within the meaning of the statute;

2. That the regulation (40 C. F. R. § 61.22(d)) is an illegal usurpation of the statutory authority to promulgate an emission standard under § 1857c-7; and

3. That the regulation is impermissibly vague.

The government contends that 42 U. S. C. § 1857h-5 deprives this Court of jurisdiction to adjudicate those claims. Section 1857h-5, provides, insofar as pertinent:

> "(b)(1) A petition for review of action of the Administrator in promulgating * * * any emission standard under section 1857c-7 of this title, * * * may be filed only in the United States Court of Appeals for the District of Columbia. * * * Any such petition shall be filed within thirty days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such thirtieth day.
>
> "(2) Action of the Administrator with respect to which review could have been obtained under paragraph one shall not be subject to judicial review in civil or criminal proceedings for enforcement."

Thus, a petition for review of "action of the Administrator in promulgating" an "emission standard" must be brought in the District of Columbia Circuit within thirty days of promulgation, or after that time if the challenge is asserted solely on new grounds. Subsection (2) forecloses later litigation in criminal enforcement proceedings,[11] of matters for which review could

10. This Court fails to discern the relevance of these arguments, with the exception of vagueness, to Count II.

11. The instant proceedings seek criminal enforcement. See 42 U. S. C. § 1857c-7(c)(1).

have been obtained under (b)(1). (See *Duquesne Light Co.* v. *Environmental Protection Agency*, 481 F. 2d 1 (3rd Cir. 1973); *Granite City Steel Co.* v. *EPA*, 501 F. 2d 925 (7th Cir. 1974); *Buckeye Power, Inc.* v. *EPA*, 481 F. 2d 162 (6th Cir. 1973), for general elucidation of the statutory mechanics, in the context of review of state implementation plans.)[12]

A. *Failure to Allege Violation of Emission Standard.*

Defendant's first, and primary, challenge focuses on the term "emission standard," as employed in § 1857c-7. More specifically, defendant asserts that § 1857c-7(c)(1)(B) prohibits emission of asbestos in violation of an *emission standard*. Pursuant to Section 1857c-7(b)(1)(B), which authorizes the Administrator to prescribe such a standard, the EPA promulgated 40 C. F. R. § 61.22(d), which directs the wetting and removal of asbestos prior to demolition. Defendant argues that § 61.22(d) is not an "emission standard" as contemplated by the Act in that it does not quantify a permissible level of emissions. Therefore, defendant reasons the statutory offense of emission in violation of a standard has not been created and cannot be alleged. Thus, the indictment is incurably defective, and must be

12. Under Section 1857c-5(a)(2), the Administrator of the EPA is required to approve (or reject) state plans. That approval is subject to judicial review under § 307, on terms identical to those covering promulgation of federal standards:

> "A petition for review of an Administrator's action in approving or promulgating any implementation plan under 1857c-5 of this title * * * may be filed only in the United States Court of Appeals for the appropriate Circuit. * * *"

Such petitions are similarly subject to the thirty-day time restriction. The only difference is in the designation of a reviewing court. Even the language is identical: § 307 refers to "action in promulgating federal emission standards"; and "action in approving or promulgating" state plans. Therefore, the conclusion that the claims which are not raised at the hearing do not constitute "action in approving" is equally applicable to the pertinent language here "action in promulgating." The difference between approval and promulgation is immaterial because the relevant aspect is what occurs during the agency action.

dismissed. Decision of that issue would necessitate examination of the text, operation, and history of the statute. This Court concludes that such a task has not been withdrawn from its jurisdiction.

In the first place, it is axiomatic that this Court retains jurisdiction to determine its own jurisdiction. Thus, even in a setting in which jurisdiction to decide substantive questions concerning agency action is apportioned among different courts, each court is entitled to decide the "jurisdictional facts," that is, those specifications which place an action properly in one court as opposed to another (*Jaffe, Judicial Control of Administrative Action*, 636 et seq. (1965)). In the instant case, the jurisdiction of the District of Columbia Circuit extends only to "action of the Administrator in promulgating • • • any emission standard • • •" (§ 1857h-5(b)(1)(A)). If a regulation is not an emission standard, the statutory preclusion is inapplicable. Consequently, the question of whether § 61.22(d) constitutes an emission standard, as posited by defendant, is a jurisdictional fact which this Court is entitled to consider. If it is deemed a standard, that line of inquiry terminates. If, on the other hand, it is not a standard, then this Court may proceed to adjudicate defendant's two remaining challenges.

Secondly, the fact that this Court ordinarily has jurisdiction to hear claims of this type is beyond dispute. Equally apparent is the substantial prejudice defendant will suffer if denied an opportunity to raise its defenses to a criminal indictment.[13] Therefore, this Court cannot, in good conscience, assent to a withdrawal of its jurisdiction without a showing of "'clear and convincing evidence' of a contrary legislative intent." (*Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 141 (1966); *Jeffe, supra*, at 336-359; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 410 (1970); *City of Chicago* v. *U. S.*, 396 U. S. 162, 164 (1969); *Rosado* v. *Wyman*, 397 U. S. 397, 420 (1969).) That is, the statutory scheme must present a virtually unequivocal

13. Defendant will have *no* legal recourse, since the thirty days from date of promulgation have long since elapsed.

intent to reserve the very issues at bar to the District of Columbia Circuit. It is in that respect that the statute, and its case law progeny, are most noticeably deficient.

The threshold question, vigorously argued by the parties, is the manner in which defendant's claim should properly be characterized. Defendant views its argument strictly as a challenge to the indictment, which does not require the Court to "review • • • action in promulgating" and, therefore, does not invoke the strictures of § 1857h-5. The government formulates the challenge as one to regulation, which would be precluded by § 1857h-5. The Court need not decide the question,[14] since it finds that under either theory, its jurisdiction has not been clearly and convincingly withheld.

Were the Court to view the controversy solely as an attack on the sufficiency of the indictment, as defendant urges, it would clearly not be confronted with the problem of reviewing action in promulgating, as provided in § 1857h-5. Rather, its attention would be directed to scrutiny of the terms of the indictment, by standards developed specifically for that purpose. Therefore, the effect of § 1857h-5 would most certainly be avoided.

Alternatively, the Court may analyze the argument as presenting interwoven challenges to the indictment and regulation. That particular course acknowledges that in order to determine the validity of the indictment, there must be reference to the regulation. However, it also refuses to overlook the fact that defendant's challenge is, ultimately, one to the indictment. Such a view is adjusted to the precise nature of defendant's argument, which questions not only the vitality of the regulation within the statutory framework, but also the ability of the government to charge defendant with commission of a crime based on the regulation.[15]

14. However, defendant's characterization as a challenge to the indictment, if accepted, would effectively circumvent the statute.

15. In that sense, this argument is critically different from *Dore Wrecking Co.* v. *Fri*, 73-1686 (D. C. Cir. 1973), which the govern-

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Section 1857h-5, by its terms, evinces no definite intent to limit such challenges. It merely states that "actions of the Administrator in promulgating" shall be "reviewed" in the District of Columbia Circuit within thirty days. Furthermore, actions susceptible to District of Columbia Circuit review "shall not be subject to judicial review in * * * criminal proceedings for enforcement." The Act nowhere delimits "action in promulgating," "review," or "proceedings." Therefore, it is impossible to ascertain, with any degree of certainty, the operative scope of the statute. If, for instance, "proceedings" applies only to the trial, the section would only foreclose selected defenses on the merits as opposed to pretrial defenses. Importantly, the pretrial type of defense is generally legal in nature, in that it disputes the charge as a matter of law. Thus, it may, as defendant does, question the existence of the elements of an offense on the ground that they are legally infirm. Contrastingly, a defense on the merits is more often submitted to the trier of fact, and contests the existence of the elements of the crime in an evidentiary fashion. It may well have been the intent of Congress to restrict review only of trial-type defenses.[16] In fact, a review of the case law indicates that such factual questions are indeed the kind of challenges which Congress consciously sought to restrict.[17]

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ment contends decided the issue at bar. Assuming for the sake of argument, that to be the case, the challenge was not to the indictment and * * * did not ask the court to gauge the regulation in that manner.

16. For example, see *Buckeye Power, supra,* wherein a defense of impossibility was raised. Although the court permitted defendant to assert it, the case exemplifies the *type* of challenge which the statute would preclude, under appropriate circumstances. A defendant could claim, for instance, that a regulation is not feasible. Therefore, it would argue, it could not comply with it. Such a defense would be presented to the trier of fact at trial. It is not strictly legal in nature. However, 1857h-5 might well preclude it as requiring review of action in promulgating.

17. See discussion, infra.

Furthermore, defendant's claim involves scrutiny not only of what might arguably be considered "action in promulgating an emission standard,"[18] but also of the indictment. It not only entails application of a standard of review which might be available to the District of Columbia Circuit,[19] but also one which clearly was not. Defendant was not charged with violation of the statute until well after the thirty-day time period had elapsed. Therefore, the type of review it now seeks, an analysis to determine whether the regulation constitutes a crime, was not obtainable in the District of Columbia Circuit, and remains open to this Court (*Granite City Steel Co.* v. *EPA,* 501 F. 2d 925, 928 (7th Cir. 1974)). Thus, viewing defendant's claim as intermingling challenges to the indictment and regulation necessitates the conclusion, in light of the undefined statutory ambit, that this Court must retain jurisdiction.

However, even were this Court to adopt the government's view that the defendant presents only a challenge to the regulation, it does not find sufficient indication in § 1857h-5 to preclude its consideration of the claim. According to the government's hypothesis, the proper analysis requires isolation of defendant's challege to the regulation from its challenge to the indictment. Thus, it urges consideration only of defendant's argument that § 61.22(d) is not a standard within the meaning of § 1857c-7, in determining whether the jurisdictional limits of § 1857h-5 pertain. The government asserts that the defendant's "no standard" argument involves review of the Administrator's action in promulgating 40 C. F. R. § 61.22(d), as identified by § 1857h-5. Therefore, it concludes that this Court lacks jurisdiction to entertain the argument, despite the fact that it is raised in the context of the sufficiency of the indictment.

This Court has attempted, without success, to define the scope of § 1857h-5. The statute, by its terms, restricts review in the District of Columbia Circuit to "action of the Admin-

18. Although in the opinion of this Court, it does not.

19. That position is tenuous at best. See discussion, infra.

istrator in promulgating * * * any emission standard under Section 1857c-7 of this title." Yet, nowhere does the statute or legislative history outline the meaning of "action in promulgating." The term itself connotes procedural action, although cases have, without explanation of the question, simply *assumed* review of substantive decisions of the agency.[20] If Congress intended only that agency procedures be reviewed within thirty days, the instant claim may clearly proceed.

In addition, "action in promulgating" appears to be distinct from, and precedent to, the promulgated regulations.[21] Yet there are no articulated guidelines which the Court may use to employ the distinction. Thus, in the instant case, it is difficult to understand whether defendant's initial challenge to the regulation, which does not directly attack the efficacy of the Administrator's action,[22] should be deemed a challenge to "action in promulgating." It is more nearly an attack on the "promulgated regulation," which requires the Court to evaluate that regulation in light of the statutory scheme.

Furthermore, there is no elucidation of the scope of "review" envisioned by § 1857h-5, which provides, *inter alia:*

> "(b)(1) A petition for review * * * may be filed only in the District of Columbia Circuit * * *"

Subsection (b)(2) continues:

> "Action of the Administrator with respect to which *review could have been obtained* under paragraph one shall not be subject to judicial review in civil or criminal proceedings for enforcement." (Emphasis added).

20. See, e.g., *Granite City Steel, supra, Commonwealth of Pa.* v. *EPA*, 500 F. 2d 246 (3rd Cir. 1974) for review of substantive considerations; *Appalachia Power Co.* v. *EPA*, 481 F. 2d 1 (3rd Cir. 1973) for review of hearing procedures.

21. It is instructive to note that the Senate version of the Bill was geared to review of "the promulgated regulation." Senate Bill was 4350, Sec. 308, at 116 Cong. Rec. 15807 (Sept. 17, 1970).

22. As does, for instance, defendant's next argument dealing with the scope of the Administrator's authority.

Thus, only the type of review available in the District of Columbia Circuit is now foreclosed to defendant. The critical question is whether the review sought herein could have been obtained under (b)(1). Specifically, the Court must define the applicable scope of review under § 1857h-5. If the District of Columbia Circuit inquiry is restricted to questions other than those at bar, then defendant was never afforded an opportunity for judicial review. Consequently, it may seek that review in the instant proceeding. (*Granite City Steel Co.* v. *EPA*, *supra*, at 928. [sic]

Unhappily, the statute fails to set forth the standard of review which the District of Columbia Circuit is to utilize. A review of case authority not only illustrates, but compounds the problems generated by statutory omission.[23] In the absence of statutory direction as to the scope of review, courts have looked to *Citizens to Preserve Overton Park* v. *Volpe*, *supra*. (See, e.g. *State of Texas* v. *EPA*, 499 F. 2d 289, 296 (5th Cir. 1974); *Appalachia Power*, *supra*, at 505).

In *Overton Park*, the Supreme Court was confronted with a claim that the Secretary of Transportation had violated statutes which permitted authorization of federal funds to finance highway construction through public parks if a "feasible and prudent" alternative route did not exist, in which case he was directed to engage in "all possible planning to minimize harm." The petitioners challenged the construction of a highway, asserting that feasible and prudent routes did in fact exist, and that the plan did not, in any event, minimize harm. In the absence of statutory statement on the scope of review, the Court turned to § 706 of the APA, which provides that "a reviewing court shall * * * hold unlawful and set aside agency

23. The discussion which follows is not intended to delineate what this court sees as the proper scope of review. Rather, it is intended to highlight the confusion attendant upon the operation of § 1857h-5. It is that confusion which this court finds determinative, in light of the fact that jurisdiction must be clearly and convincingly withdrawn.

action, findings, and conclusions found not to meet six separate standards," (at 413) namely:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall - -
>
> • • • • •
>
> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be - -
>
> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> "(B) contrary to constitutional right, power, privilege, or immunity;
>
> "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> "(D) without observance of procedure required by law;
>
> "(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> "(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

The Court continued:

> "In all cases, agency action must be set aside if the action was 'arbitrary and capricious' * * * or if the action failed to meet statutory, procedural, or constitutional requirement. 5 U.S.C. § 706(2)(A), (B), (C), (D). (at 414). * * * In certain narrow, specifically limited situations, the agency action is to be set aside if the action was not supported by 'substantial evidence.'
>
> "And, in other equally narrow circumstances, the reviewing court is to engage in a *de novo review* * * * 5 U.S.C. § 706(2)(E)(F) * * *
>
> • • • • •
>
> "Review under the substantial evidence test is authorized only when the agency action is taken pursuant to a rule-

> making provision of the APA itself, 5 U.S.C. § 553. (at 414).
>
> • • • • •
>
> "*De novo* review * * * is authorized when the action is adjudicatory in nature * * * (or) when issues were not before the agency (at 415)."

Concluding that there was no exercise of a rule-making function and that de novo review was unwarranted, the Court proceeded to consider three of the remaining standards:

> "* * * the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry * * *
>
> "The court is first required to decide whether the Secretary acted within the scope of his authority * * *
>
> "Section 706(2)(A) requires a finding that the actual choice made was not arbitrary * * *. The final inquiry is whether the Secretary's action followed the necessary procedural requirements. (415-17)."

Thus, the Court surveyed the entire spectrum of potential standards of review, eliminated those which were inapposite, and applied the remainder, that is, the latter three, i.e., scope of authority, arbitrary and capricious, and procedure.

Some courts have adverted to the three *Overton* standards of review within the context of the Clean Air Act and, specifically, § 1857h-5. (*State of Texas, supra*, at 296; *Appalachia Power Co., supra*, at 505). However, their analyses are not altogether helpful. In the first place, the statute in *Overton Park*, unlike the statute at bar, does not provide a bifurcated system of review. Therefore, the *Overton* approach offers only analogous guidance as to the proper scope of review when one form of review is temporarily restricted, and the other consists of criminal enforcement. Secondly, the Court in *Overton Park* did *not* decide, as courts seem to have subsequently presumed, that only three types of review are available when a statute is silent on the subject. Rather, *Overton* simply scanned the panoply of review and selected the three it found appropriate to the

case then under consideration. For instance, *Overton Park* explicitly stated that unconstitutionality was a potential standard, but did not discuss it further because the claim did not so require.

The confusion is exacerbated when comparing the analyses on standards of review of *State of Texas, Appalachia Power, Buckeye Power,* and *Getty Oil* with *Delaware Citizens for Clean Air* v. *EPA*, 480 F. 2d 972, 975-6 (3rd Cir. 1973); *Commonwealth of Pa.* v. *EPA*, 500 F. 2d 246, 250 (3rd Cir. 1974); *Friends of the Earth* v. *USEPA*, 499 F. 2d 1118, 1123 (2nd Cir. 1974); *Nat. Res. Def. C.* v. *EPA*, 478 F. 2d 875, 881 (1st Cir. 1973); *Buckeye Power, supra,* at 171.

Thus, the only definite conclusion which this Court can draw from an analysis of the case law is that the operative scope of the statute is undefined. The language itself provides no guidance; the ensuing case law reflects and intensifies, rather than clarifies, the statutory ambiguity. That portion of the precedent which indicates that review in the District of Columbia Circuit is limited to the question of whether the agency action is "arbitrary and capricious" would tend to support this Court's jurisdiction. However, even if this Court were to ignore those decisions, it would be persuaded by the great uncertainty and inconsistency resulting from judicial attempts to define § 1857h-5 that Congress has not evinced a clear purpose to bar the instant judicial review.

Furthermore, Congress has not clearly and convincingly withdrawn jurisdiction of the type of issue here presented. Defendant's argument questions the *existence* of a viable regulation; it seeks a determination that the regulation in question does not comply with the legal requirements envisioned by Congress and embodied by the Act. That type of inquiry is quite different from that engaged in by the courts under § 1857h-5, as illustrated by several of the cases cited by the government. In *Getty Oil Co.* v. *Ruckelshaus,* 467 F. 2d 349 (3rd Cir. 1972), plaintiff challenged a regulation as unnecessary because the

national primary standard had been met, and as burdensome in that it imposed undue economic hardship. In *Granite City Steel, supra,* the regulation was challenged on the ground that it contained an unreasonable attainment date.[24] Thus, the challenges in the cases relied upon by the government have questioned the judgmental aspects of the Administrator's decisions: the feasibility, cost, or adequacy of a given regulation,[25] or in other terms, those courts were asked to assess the wisdom, rather than the legality of regulations.[26] The inquiry was, therefore,

24. For treatment of similar issues see *Delaware Citizens for Clean Air* v. *USEPA*, 480 F. 2d 972 (3rd Cir. 1972), (adequacy of plan to attain proper level); *International Harvester Co.* v. *Ruckelshaus*, 478 F. 2d 615 (D. C. Cir. 1973) (availability of technology); *State of Texas, supra* (cost factors, wisdom of methods); *Friends of the Earth* v. *USEPA*, 499 F. 2d 1118 (2nd Cir. 1974) (impact of mass transit and parking); *Duquesne Light Co., supra* (reasonableness of plan); *Commonwealth of Pa.* v. *EPA, supra* (whether air bleed retrofit program is practicable method for achieving standard); *Nat. Res. Def. Co., Inc.* v. *USEPA*, 483 F. 2d 690 (8th Cir. 1973) (degree of intergovernmental cooperation required); *Portland Cement Assoc.* v. *Ruckelshaus*, 486 F. 2d 375 (D. C. Cir. 1973) (cost, achieveability; *Essex Chemical Corp.* v. *Ruckelshaus*, 486 F. 2d 427 (D. C. Cir. 1973) (achievability, adequate demonstration of standard).

The *bulks* of the remainder of cases deal with review of ministerial or procedural aspects of agency action. The only case which more closely approximates the one at bar is *Nat. Res. Def. Co., Inc.* v. *EPA*, 489 F. 2d 390 (5th Cir. 1974) rev'd. 43 LW 4467. One of the issues in that case was the meaning of the language in § 1857c-5(a)(2)(B). The court, on a petition under § 1857h-5, found, after review of pertinent statutory sections, that "emission limitations and such other measures as may be necessary" meant that standards should be promulgated unless impracticable. The ultimate question there, however, was the impact of the phrase "as may be necessary." Thus, the court was actually defining one of the areas of agency expertise explicitly incorporated into the statute.

25. For example, in the instant case, such an inquiry would scrutinize whether the regulation provides "an ample margin of safety" under § 1857c-7.

26. The government offers *Dore Wrecking Co.* v. *Fri*, 73-1686 (D. C. Cir. 1973), for the proposition that the instant issue is within the jurisdiction of the District of Columbia Circuit. In that case, petitioner Dore filed a motion for stay pending review arguing that the regulation in question exceeded the Administrator's authority,

(Continued on next page)

into areas of agency discretion and expertise on the subject of pollution. In contrast, the question at bar, which concerns the legal definition of "standard," may not be classified as requiring a judgment peculiarly within the agency's competence. It is fundamentally legislative and judicial in nature, does not involve the agency's expertise, and does not require merely an exercise of administrative discretion. Therefore, it does not appear to be the type of issue which Congress reserved to the District of Columbia Circuit.

That conclusion finds support in both the judicial and legislative arenas. Courts, although in disagreement in the apposite standards of review, have been unanimous in defining their role in the application of those standards:[27]

> "In subjecting the Administrator's actions to judicial review, we apply a test of reasonableness, wherein *we are not empowered to substitute (our) judgment for that of the agency.*" (Emphasis added). (*Essex Chemical, supra,* at 431. See also *Portland Cement, supra,* at 426; *Friends of the Earth, supra,* at 1123; *Del. Cit. for Cl. A., supra,* at 976.

(Continued from preceding page)

which was dismissed as moot. Respondent's motion to dismiss the petition for review was granted, the court noting that there was "No exigent circumstances * * * excusing petitioner's failure to file a timely petition for review." Aside from the cryptic nature of the order, which casts some doubt on the precise holding and its precedential value, the issue is distinguishable in that it challenged the authority of the Administrator. This Court is not reaching that issue, basing its conclusion instead on defendant's "no standard" theory. Thus, the instant issue does not involve scrutiny of the Administrator's action according to a standard suggested in *Overton Park, supra.*

27. Thus, for instance, if a court is asked to decide whether a certain regulation is within the authority of the Administrator to promulgate "achievable systems (see *Essex Chemical, supra*), it is basically engaging in a factor analysis of the reasonableness of the regulation, akin to the "arbitrary and capricious" standard of review. Its task is limited by the nature of "achievability" as involving expertise and discretion. It then makes little difference which rubric a court selects to characterize its review; the fact remains that the type of review utilized for appraising the wisdom of a regulation does not approximate the review sought by defendant herein.

Review which simply tests the reasonableness of the agency's action and accords it a high degree of deference is clearly appropriate to judge the wisdom of a regulation. It is not, however, effective in analyzing issues such as the one at bar. Thus, it is fair to conclude that the operation of § 1857h-5, as reflected in the review methodology of the Circuit Courts, is tailored to questions involving the expertise and discretion of the agency.[28]

In addition, there is no definitive legislative pronouncement which clarifies the scope of § 1857h-5. This Court has searched the history of the statute for such indicators without success. The paucity of explicit congressional elaboration, in combination with the observation that the vast preponderance of the challenges under § 1857h-5 have been to the wisdom of the regulation, underscores the failure of Congress to consider the possibility of issues such as the one at bar. Congressional failure to define the term "emission standard" further evidences the lack of conscious consideration afforded the instant issue.[29] Simply, Congress, in enacting the section, contemplated only the questions exemplified by *Getty Oil* and *Granite City Steel;* it did not anticipate problems such as those involved in *defining* "emission standard." Therefore, Congress, cognizant only of former types of litigation, quite sensibly restricted access to the courts on those issues. It did not, however, explicitly preclude review of the issue at bar.

An examination of § 1857h-5 to determine whether it preempts defendant's challenge has convinced this Court that its scope is, at best, highly ambiguous.[30] In view of the lack of

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28. Thus, even were the court to adopt the full range of review suggested in *Overton Park, supra,* it would not eliminate the instant case from its jurisdiction, since those standards of review have not being geared to the instant type of inquiry.

29. Thus, although the legislative history is replete with reference to control of pollution, it nowhere explains the exact mechanism for control. See 3 U. S. Code Cong. & Adm. News, 5356 (91st Cong. 21 Sess. 1970).

30. This court is aware of its responsibility to interpret the statute, but it is unable to do so with any degree of ease. Therefore, it chooses to resolve doubts in favor of jurisdiction.

clarity which reflects the Congressional failure to explicitly incorporate the instant issue within the ambit of § 1857h-5, this Court is compelled to conclude that the present claim has not been clearly and convincingly removed from its jurisdiction. Accordingly, this Court will retain jurisdiction over defendant's contention that 40 C. F. R. § 61.22(d) is not a standard, and will proceed to the merits of that argument.

IV.

Defendant, Adamo Wrecking Company, is charged in an indictment with violating 42 U. S. C. § 1857c-7, which provides, inter alia:

> "(C)(1) after the effective date of any emission standard under this section - -
>
> * * * * *
>
> "(B) *no air pollutant* to which such standard applies *may be emitted* from any stationary source *in violation of such standard* * * *" (Emphasis added).

Thus, the crime consists of a prohibited emission of asbestos, in violation of an emission standard.

Section 1857(b)(1)(B) authorizes the promulgation of an emission standard:

> "(b)(1)(B) * * * the Administrator shall prescribe an *emission standard* for such pollutant * * *"

Pursuant to that mandate, the Administrator promulgated the regulation codified in 40 C. F. R. § 61.22(d), subdivision (2)(i) of which specifically provides:

> "Friable asbestos materials, used to insulate or fireproof any boiler, pipe, or load-supporting structural member, shall be wetted and removed from any building * * * before wrecking of a load-supporting structural member is commenced."

The indictment alleges emission in violation of the regulation, by alleging that defendant "did knowingly cause the emission of

asbestos * * * by failing to wet and remove * * * asbestos material * * * before demolition had begun." Defendant contests the sufficiency of both counts of the indictment, contending that it fails to charge an essential element of the offense, to-wit: an emission in *violation of a standard*. More specifically, defendant argues that the allegation in the indictment charging defendant with a failure to wet and remove asbestos, though a paraphrase of the promulgated regulation, fails to state that defendant violated a standard because the regulation is not a "standard" within the contemplation of the Act. An "emission standard," defendant argues, must establish a set, measurable level of emission. Since the instant regulation merely prescribes a methodology for emission control, namely, the "wet and remove" procedure, it is not a "standard," and cannot furnish the basis upon which to allege violation of a standard. Thus, it is asserted, the indictment is incurably defective, and must fall.

Careful consideration of defendant's argument prompts this Court to adopt its analysis.[31] The regulation provides a procedure for the reduction of emissions; it requires that "friable asbestos materials" be "wetted and removed" prior to demolition. A review of the administrative history reveals that the Administrator published a proposed emission standard for asbestos, which prohibited visible emissions (36 FR 23931). In response to criticism of that proposal, and with the awareness of the difficulty of measuring airborne asbestos,[32] the EPA promulgated what it classifies as a "work practice":

> "The proposed standard would have prohibited visible emissions of asbestos * * *. Comments indicated that the no visible emissions requirement would prohibit repair and demolition in many situations * * *. Accordingly, the promulgated standard specifies certain *work practices* which

31. However, this court discerns it as a challenge only to Count I, and can see no bearing on Count II.

32. 38 FR 8821 et seq; see also *Background Information on the Development of National Emissions, Standards for Hazardous Air Pollutants*, pp. 23-25.

must be followed when demolishing certain buildings and structures." (38 FR 8821 (1973)).[33]

The question before this Court, then, is whether the statutory term "emissions standard" is intended to encompass a "work practice," or whether it refers only to specification of a *level* of emission. The statute, unhappily, does not define the term. However, a review of the legislation convinces this Court that the narrower construction must prevail.

The plain meaning of the words, which the Court should not overlook (*Bouie* v. *City of Columbia*, 378 U. S. 347 (1964)) connotes a rate or quantity,[34] and at least several courts have been of that opinion.[35] In addition, § 1857c-7(b)(1)(B) directs that the "Administrator shall prescribe an emission standard * * * *at the level* at which in his judgment provides an ample margin of safety." (Emphasis supplied). Thus, the implication that a standard is to specify a level is unmistakable. It is reinforced by reference to a description in the legislative history which says: "* * * *emission levels* must provide an ample margin of safety to assure public health protection" (3 U. S. Code Cong. & Adm. News 5379 (Emphasis supplied)). The necessity for a level is also contemplated by § 1857c-6 which defines a "standard of performance" as:

> "a *standard for emissions* * * * which *reflects the degree of emission limitation* achievable through the application of the best system of emission reduction * * * which the

33. See also letter from Russell Train to Gerald Ford, of March 22, 1974.

34. In fact, a study prepared with the support of the National Science Foundation concerning automotive emission standards states: "Emission standards specify the maximum legally permissible flow rates of certain pollutants from the emission source into the air."

35. In the Illinois cases, cited in footnote 9, supra, the courts indicated that they felt that § 61.22(d) was not a standard. The government's assertions to the contrary ignore the conclusions of Judge Decker, in *National Wrecking* at pp. 3 and 4, wherein he states: "The Administrator promulgated methods of control *without specifying emission standards* * * *." Similarly, Judge Bauer, in *Harvey Wrecking*, supports that conclusion at p. 4 of that opinion

> Administrator determines has been adequately demonstrated." (Emphasis added).

A "standard of performance" is an emission standard which reflects a feasible degree of limitation. Thus, it is clear that one type of emission standard must express a degree of limitation, that is, a measurable level. Importantly, § 1857c-6 does not require a standard of performance to *reflect the best system demonstrated*, but to reflect *the degree of limitation* which that system permits. A review of the standards promulgated pursuant to § 1857c-7 confirms that interpretation. (40 C. F. R. § 60.1 et seq.).

Furthermore, the high degree of identity between a "standard of performance" (§ 1857c-6) and an "emission standard" (§ 1857c-7), suggests that both must be expressed in terms of levels. An emission standard generally applies to ultra-hazardous pollutants from new or existing sources, whereas a standard of performance applies to new stationary sources. However, under § 1857c-6(d)(1) an "emission standard" is to be promulgated for existing sources which would require a "standard of performance" if new. The sources are identical; the only difference is their age. Therefore, the two types of regulations are also intended to be identical, in the manner in which they specify control. The identity is also indicated in the legislative history, which explains that emission standards are to be developed in both instances:

> "The legislation, therefore, grants authority * * * to establish *emission standards* for any (new or ultra-hazardous) sources * * * which constitute new sources of substantially increased pollution." (3 U. S. Code Cong. & Adm. News 5361, 91st Cong. 2d Sess. 1970).

Thus, it appears that an "emission standard," like a "standard of performance" must reflect a level of emission.

Furthermore, the intent to require a level is apparent from the development of the Act. The Senate version completely prohibited emissions of hazardous pollutants, unless the Admin-

istrator could determine that limited amounts of such pollutants did not present a danger,[36] in which case he was directed to promulgate an "emission standard." The provision was explained as follows:

> "The Secretary establishes emission controls through the publication of proposed prohibitions * * * and promulgates such prohibitions unless he determines that a departure from a zero emission * * * will not jeopardize health * * * whereupon he promulgates an *emission standard prescribing the permissible level of emission for such pollution agents.*" (116 Cong. Rec. 16256). (Emphasis added).

Thus, it is clear that from the inception of the Act, the term "emission standard" was intended to connote a level of emission.

In addition, since both emission standards and standards of performance are means of "reflecting degree of emission limitation," an emission standard is a type of emission limitation. The Supreme Court describes an emission limitation as:

> "regulation(s) of the composition of substances emitted into the ambient air from sources * * *." (*Train* v. *Nat. Res. Def. Council, Inc.*, 43 LW 4467, 4472 (1975)).

In a letter of March 22, 1974, the Administrator of the EPA, Russell Train, suggested, with direct reference to the regulation in issue, that "emission limitation" does indeed refer to quantification:

> "We are requesting Congressional affirmation of our authority to set design, equipment, or practice standards under those sections where the limitations of measurement technology make an *emission limitation* approach infeasible or impractical."

That is an obvious acknowledgment that the disputed regulation does not follow the emission limitation approach because it is unfeasible to promulgate a numerical standard. *Nat. Res. Def. Council, Inc.* v. *EPA*, 489 F. 2d 390 (8th Cir. 1974), rev'd

36. See S. Bill 4358, Sec. 115, at 116 Cong. Rec. 15000 (Sept. 17, 1970), and explanation at 3 U. S. Code Cong. & Adm. News 5378-9.

other grounds, 43 LW 4467, equates "emission limitation" with "emission standard." There, the court considered the meaning of § 1857c-5(a)(2)(B), which requires, "emission limitations and such other measures as may be necessary." The court concluded that § 1857c-5(a)(2)(B) required *emission standards* unless such standards are unfeasible.[37] Thus, the conclusion that an emission limitation, of which a standard is a subcategory, requires a level is not unreasonable. The EPA has admitted that it has proven impracticable to follow the emission limitation approach. This is tantamount to an admission that the mandate of the statute was not followed.

Furthermore, § 1857c-5(a)(2)(B) is instructive in that it illustrates an instance in which Congress, intending to provide for options other than emission standards, in exigent circumstances, did so explicitly. The negative inference as applied to § 1857c-7 is certainly proper.

Support for this Court's construction of "emission standard" may be found in other sections of the Act. Thus, § 1857c-4 directs promulgation of "national primary and secondary ambient air quality standards." Section 1857c-4(b)(1) provides:

> "National primary * * * standards * * * shall be ambient air quality standards * * * allowing an adequate margin of public health."

The language is highly reminiscent of § 1857c-7: all standards promulgated thereunder contain levels. (See 40 C. F. R. 50.4, 50.6, 50.8, 50.9, 50.10, 50.11).[38]

37. See also EPA Staff Paper, 119 Cong. Rec. 10955-56 to the same effect.

38. The government contended, on oral argument, that an ambient air standard differed from an emission standard in that the latter measures airborne concentrations while the former is directed to the source. It suggested that an emission standard included all types of controls applied to the source. That distinction is not consistent with the statutory language or history, and cannot be accepted. The more logical interpretation is that ambient standards refer to acceptable levels generally, whereas emission standards designated by source refer to acceptable levels of emission for each source.

Similarly, § 1857c-5(b)(2) requires that national secondary standards "shall specify a *level* of air quality." The regulations do so specify (40 C. F. R. 50.5, 50.7). Emission standards for moving sources, under § 1857f-1, must also specify a level which requires "a reduction of at least 90% per centum from emissions * * *." All promulgated regulations under that section also contain levels. (40 C. F. R. 85.1 et seq.).

Finally, the statutory pattern appears to approach the problem of emissions via two avenues: measureable standards, and procedures for implementing them. Each approach is distinct. In § 1857c-7, in addition to prescribing a standard, the Administrator must also issue "information on pollution control techniques." (§ 1857c-7(b)(1)(B)(2)). The President may exempt a source "if he finds that the technology to implement such standards is not available." Section 1857c-6(b)(1)(B)(3) directs publication of information on control techniques for sources subject to standards of performance. Under Section 1857c-6(d)(1), the Administrator "establishes emission standards," *and* "provides for the implementation" thereof. Under § 1857f-1(b)(1)(B)(4), the Administrator is to report to Congress "with respect to the development of systems necessary to implement the emission standards established pursuant to this section." Thus, Congress was clearly separating standards from methods of control. That separation supports the conclusion that the instant regulation is not a standard.

Importantly, there appear to be no persuasive arguments in support of the government's position. It claims that the regulation is an emission standard because, emissions from asbestos are harmful, measurement of such emissions is impractical, and therefore a work practice is in order. (See 38 FR 8820, (April 6, 1973); *Background Information, supra*).

It buttresses that argument[39] with reference to 42 USC §1857(b)(1) which announces that the purpose of the Act is to

39. The government relies also upon *Dore Wrecking* v. *Fri, supra*. However, the holding there *appears* to be only that, "there being no exigent circumstances presented in the case excusing petitioner's failure to file a timely petition for review."

"protect and enhance the quality of the nation's air * * *;" and to 42 USC § 1857g(a) which provides:

> "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter."

The government argues that the general purpose of the Act as well as the broad power delegated to the Administrator justify an expansive reading of the term "emission standard." This Court finds the contentions to be untenable. Congress did indeed propose to protect the environment. However, it chose to effectuate its purpose by means of standards which set permissible levels of emission. Furthermore, acceptance of the suggested impact of § 1857(g)(a) upon promulgation of a standard would effectively bypass the parameters set forth by Congress by affording the agency an opportunity to redefine them.[40]

Thus, the government's argument essentially asks this Court to uphold § 61.22(d) because it has found that asbestos is harmful and not easily susceptible to measurement. While this Court is fully convinced that the Administrator has appropriately characterized asbestos emissions, it cannot allow subsequently discovered exigencies to modify the statutory framework. There is absolutely no indication that Congress knew or anticipated the type of problem which prompted promulgation of the work practice.[41] Nor is there any statutory language or history to support a broad interpretation.[42] Therefore, the proper corrective is an amendment to the Act.[43]

40. Therefore, this Court concludes that § 1857(g) refers to auxiliary regulations, and does not authorize expansion of existing guidelines. Accordingly, § 61.22(d) may be duly authorized, but it is not a standard.

41. Those findings first appear in the Administrative hearings.

42. All such evidence is to the contrary.

43. Importantly, such an amendment has been suggested. 42 USC § 1857c-7(b)(1)(B) would read: "If the Administrator determines that technological or economic limitations on application of measurement methodology to particular class of sources

(Continued on next page)

The government seeks to reinforce its position by application of two principles of construction: deference to agency interpretation and liberal construction of criminal regulatory statutes. Specifically, the government asks this Court to defer to the EPA interpretation of emission standard,[44] and to accord the term a "liberal" construction.[45] This Court cannot, however, abide by either principle.

Deference to this administrative interpretation would require the Court to accede to the view that "standard" incorporates "work practice" simply because the EPA says it does. In attempting to substitute its judgment for that of Congress, it is asking the Court to do by indirection what the Court has declined to do forthrightly.[46]

Further, an agency interpretation is not deserving of automatic deference; it must be reasonable, supportable and consistent.[47] Otherwise, deference becomes obedience to administrative fiat.

Finally, the cases cited by the government are distinguishable from the one at bar in two important particulars. First, none are in a criminal setting. Therefore, none can be said to stand

(Continued from preceding page)
would make the imposition of emission standard infeasible, he may instead prescribe a design or equipment standard * * *." The amendment is requested by the EPA.

44. The government cites *Udall* v. *Fullman*, 380 U. S. 1, 16 (1965); *Northway Lanes* v. *Hackley Union Nat. Bank & Trust Co.*, 464 F. 2d 855 (6th Cir. 1972).

45. The government cites *U. S.* v. *Kordell*, 164 F. 2d 913 (7th Cir. 1947), aff'd. 335 U. S. 345 (1948).

46. In the context of delegation of authority, such a result would be contrary to prevailing concepts. It is Congress which defines the contours of agency action; the agency merely supplies the details. See, e.g. *U. S.* v. *Shreveport Grain & Elevator*, 287 U. S. 77 (1932); *Kent* v. *Dulles*, 357 U. S. 116, 128 (1957), *Yakus* v. *U. S.*, 321 U. S. 414, 423, 426.

47. In the instant case, even the Administrator's pronouncements have been consistent. See his letters of March 22, 1974, February 3, 1975, 38 FR 8820.

for the proposition that an agency definition of an element of a crime is to receive deference. Such definitions are manifestly judicial in nature; agencies have no special expertise in the area which would require deference. Secondly, none deal with a statute in which the agency interpretation, in effect, defines its own authority to act. Deference to an agency in that area would encourage and shield enlargement of agency functions beyond their statutory scope. Therefore, the principle of deference is not compelling.

With regard to plaintiff's argument for a liberal construction of the term "emission standard," to include "work practice" the Court is equally unimpressed. In the first place, this Court remains skeptical of plaintiff's assertion that a "liberal construction" is appropriate.[48] However, even assuming its applicability for the sake of argument, it would be tantamount to ignoring the Congressional intent in favor of the agency viewpoint. Such a result is clearly not required by the policies of liberal construction.

Furthermore, even a liberal statutory construction must be within the parameters envisioned by Congress and dictated by common sense. As the Supreme Court opined in *Kordel* v. *U. S.*, 335 U. S. 345, 349 (1948):

> "A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute * * *. But there is no canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes to it."

Since the rule of reasonableness must always temper statutory construction, this Court cannot permit expansion of the term "emission standard" beyond its statutory and sensible meaning. The statute seeks to control pollution *by means of emission standards*. As one court has explained:

48. Since delegations of legislative authority are generally limited in scope (see footnote 46), it would be wise to construe them narrowly.

"* * * we find that * * * Congress intended * * * to require maximum use of emission standards. Some sections show a general preference on the part of Congress for emission standards; * * *.

The sections exhibiting Congress' preference for emission standards are sections 1857c-6(a)(1) and 1857c-7(b)(1)(B). Those sections provide, respectively, for the establishment of federal emission standards for new sources (section 1857c-6(a)(1)) and for emission of hazardous air pollutants (section 1857c-7(b)(1)(B)). Both sections make clear that the Administrator is to establish *emission standards;* they do not contemplate control of pollution from new sources or of hazardous pollutants by dispersion techniques, or by any other techniques besides emission limitation." (*National Resources Def. Council, Inc.* v. *EPA*, 489 F.2d 390, 408-9 (5th Cir. 1974), emphasis in the original, *reversed other grounds*, 43 LW 4467; See also *EPA Staff Paper, supra,* 119 Cong. Rec. at 10955 (daily ed, June 12, 1973).

It is clear, then, that the statutory approach to pollution control requires an emission standard. That requirement cannot be altered by general consideration of statutory objectives and practical obstacles. This Court is persuaded, in that regard, by the reflections of the Supreme Court in *U. S.* v. *Standard Oil Co.*, 348 U. S. 224 (1965):

"This case comes to us at a time in the nation's history when there is greater concern than ever over pollution - - * * * . The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted or in stretching statutory language in a criminal field to meet strange conditions."

Accordingly, the Court finds, on the basis of defendant's first argument, that Count I of the indictment must be dismissed.

V.

Defendant is charged in Count II of the indictment with knowingly making a false statement, to wit: a representation that a building did not contain friable asbestos, when it did; in

violation of 42 U. S. C. 1857c-8(c)(2) and 40 C. F. R. § 61.22(d)(1). Those sections provide, insofar as pertinent:

"Any person who knowingly makes any false statement in any * * * document filed or required to be maintained under this chapter, shall upon conviction be punished * * *."

40 C. F. R. § 61.22(d) requires:

"Any owner or operator * * * who intends to demolish any * * * building * * * which contains * * * friable asbestos shall comply with the requirements set forth in this paragraph.

(1) Written notice of intention to demolish shall be provided * * *. Such notice shall include the following information:

(i) name of owner or operator.

(ii) address of owner or operator.

(iii) description of the building, * * *.

(iv) address of building * * *.

(v) scheduled * * * dates of demolition * * *.

(vi) method of demolition * * *.

(vii) procedures to be employed * * *."

Defendant challenges the indictment on two grounds: (1) that § 61.22(d) is improper; and (2) that the term "friable asbestos" is impermissibly vague and therefore defendant could not have knowingly perpetrated a falsehood.

Defendant first argues that the report in issue is not a report "under this chapter" within the meaning of § 1857c-8(c)(2) in that it is required by regulation rather than statute. That argument is without merit inasmuch as a regulation promulgated pursuant to statutory authority is "under this chapter."

Defendant next argues that § 61.22(d)(1) is not "under this chapter" in that it is not properly promulgated pursuant to § 1859c-9, which provides:

"(a) For the purpose (i) of developing or assisting in the development of * * * *any emission standard* under section

1857c-7 of this title, (ii) of determining whether any person is in violation of *any such standard* - -

(1) The Administrator may require the owner or operator of any emission source to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require; * * *."

Defendant contends that since there is no "emission standard," the regulation in issue is not promulgated for the purposes authorized, and that therefore it is inoperative. The argument has undeniable appeal, especially as it relates to "determining whether any person is in violation of any such standard," which assumes the existence of a standard. However, the regulation may also have been promulgated "for the purpose of developing" a standard, in which case, the existence of a viable standard is not necessary. In the absence of any argument by the government on that issue, this Court declines to reach a determination. It does note, with some degree of concern, the inconsistency that results from claiming the existence of a standard, and the simultaneous need for a regulation to aid in the development of one.

Defendant also contends that the term "friable asbestos" is vague, and that therefore there can be no knowingly false statement. The government counters, quite appropriately, that vagueness is to be measured by practice within the trade. Since the Court has been presented with no evidence as to its meaning, it will defer its decision as to jurisdiction and substance pending presentation of the facts. As a threshold matter, it would seek clarification of the precise charge against defendant. The nature of defendant's purported misstatement is unclear. If it simply did not report the existence of friable asbestos, there appears to be no violation of the statute, since § 61.22(d)(1) does not require such information. If, as the indictment charges, defendant affirmatively stated that there was no friable asbestos, there is a

question as to whether the report was filed under § 61.22(d), as the indictment charges. Section 61.22(d) requires notice by owners of the demolition operation which involves friable asbestos. The fact that defendant said that there was none indicates that it may not have filed the report pursuant to that section. In any event, the Court should inquire as to the precise circumstances and statement involved.

Accordingly, this Court's decision as to Count II is held in abeyance, pending appropriate presentation of facts and legal arguments.

IT IS SO ORDERED.

/s/ PHILIP PRATT
Philip Pratt
United States District Judge

Dated: June 6, 1975
Detroit, Michigan

APPENDIX C.

Sec. 112.(a) For purposes of this section:

(1) The term 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(2) The term 'new source' means a stationary source the construction or modification of which is commenced after the Administrator proposes regulations under this section establishing an emission standard which will be applicable to such source.

(3) The terms 'stationary source', 'modification', 'owner or operator' and 'existing source' shall have the same meaning as such terms have under section 111(a).

(b)(1)(A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section.

(B) Within 180 days after the inclusion of any air pollutant in such list, the Administrator shall publish proposed regulations establishing emission standards for such pollutant together with a notice of a public hearing within thirty days. Not later than 180 days after such publication, the Administrator shall prescribe an emission standard for such pollutant, unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant. The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant.

(C) Any emission standard established pursuant to this section shall become effective upon promulgation.

(2) The Administrator shall, from time to time, issue information on pollution control techniques for air pollutants subject to the provisions of this section.

(c)(1) After the effective date of any emission standard under this section—

(A) no person may construct any new source or modify any existing source which, in the Administrator's judgment, will emit an air pollutant to which such standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and

(B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(i) such standard shall not apply until 90 days after its effective date, and

(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(2) The President may exempt any stationary source from compliance with paragraphs (1) for a period of not more than two years if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security. An exemption under this paragraph may be extended for one or more additional periods, each period not to exceed two years. The President shall make a report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(d)(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in such State. If the Administrator finds the State pro-

cedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to stationary sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section.

• • • • •

Sec. 113(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or

(C) violates section 111(e), section 112(c) or section 119 (g) shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

[PL 93-319, June 24, 1974]

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

• • • • •

Sec. 307(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

[PL 93-319, June 24, 1974]

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

APPENDIX D.

Subpart A—General Provisions

§ 61.01 Applicability.

The provisions of this part apply to the owner or operator of any stationary source for which a standard is prescribed under this part.

§ 61.02 Definitions.

As used in this part, all terms not defined herein shall have the meaning given them in the act:

(a) "Act" means the Clean Air Act (42 U. S. C. 1857 et seq.).

(b) "Administrator" means the Administrator of the Environmental Protection Agency or his authorized representative.

(c) "Alternative method" means any method of sampling and analyzing for an air pollutant which does not meet all of the criteria for equivalency but which has been demonstrated to the Administrator's satisfaction to, in specific cases, produce results adequate for his determination of compliance.

(d) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(e) "Compliance schedule" means the date or dates by which a source or category of sources is required to comply with the standards of this part and with any steps toward such compliance which are set forth in a waiver of compliance under § 61.11.

(f) "Construction" means fabrication, erection, or installation of a stationary source.

(g) "Effective date" is the date of promulgation in the FEDERAL REGISTER of an applicable standard or other regulation under this part.

(h) "Equivalent method" means any method of sampling and analyzing for an air pollutant which has been demonstrated to the Administrator's satisfaction to have a consistent and quantitatively known relationship to the reference method, under specified conditions.

(i) "Existing source" means any stationary source which is not a new source.

(j) "Modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any hazardous air pollutant emitted by such source or which results in the emission of any hazardous air pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered physical changes, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the stationary source;

(ii) An increase in hours of operation.

(k) "New source" means any stationary source, the construction or modification of which is commenced after the publication in the FEDERAL REGISTER of proposed national emission standards for hazardous air pollutants which will be applicable to such source.

(l) "Owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(m) "Reference method" means any method of sampling and analyzing for an air pollutant, as described in appendix B to this part.

(n) "Startup" means the setting in operation of a stationary source for any purpose.

(o) "Standard" means a national emission standard for a hazardous air pollutant proposed or promulgated under this part.

(p) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant which has been designated as hazardous by the Administrator.

• • • • •

Subpart B—National Emission Standard for Asbestos

§ 61.20 Applicability.

The provisions of this subpart are applicable to those sources specified in § 61.22.

§ 61.21 Definitions.

Terms used in this subpart are defined in the act, in subpart A of this part, or in this section as follows:

(a) "Asbestos" means actinolite, amosite, anthophyllite, chrysotile, crocidolite, tremolite.

(b) "Asbestos material" means asbestos or any material containing asbestos.

(c) "Particulate asbestos material" means finely divided particles of asbestos material.

(d) "Asbestos tailings" means any solid waste product of asbestos mining or milling operations which contains asbestos.

(e) "Outside air" means the air outside buildings and structures.

(f) "Visible emissions" means any emissions which are visually detectable without the aid of instruments and which contain particulate asbestos material.

§ 61.22 Emission standard.

(a) Asbestos mills: There shall be no visible emissions to the outside air from any asbestos mill except as provided in paragraph (f) of this section. Outside storage of asbestos materials is not considered a part of an asbestos mill.

(b) Roadways: The surfacing of roadways with asbestos tailings is prohibited, except for temporary roadways on an area of asbestos ore deposits. The deposition of asbestos tailings on roadways covered with snow or ice is considered "surfacing."

(c) Manufacturing: There shall be no visible emissions to the outside air, except as provided in paragraph (f) of this section, from any building or structure in which the following operations are conducted or directly from any of the following operations if they are conducted outside of buildings or structures.

(1) The manufacture of cloth, cord, wicks, tubing, tape, twine, rope, thread, yarn, roving, lap, or other textile materials.

(2) The manufacture of cement products.

(3) The manufacture of fireproofing and insulating materials.

(4) The manufacture of friction products.

(5) The manufacture of paper, millboard, and felt.

(6) The manufacture of floor tile.

(7) The manufacture of paints, coatings, caulks, adhesives, sealants.

(8) The manufacture of plastics and rubber materials.

(9) The manufacture of chlorine.

(d) Demolition: Any owner or operator of a demolition operation who intends to demolish any institutional, commercial, or industrial building (including apartment buildings having more than four dwelling units), structure, facility, installation, or portion thereof which contains any boiler, pipe, or load-supporting structural member that is insulated or fireproofed with friable asbestos material shall comply with the requirements set forth in this paragraph.

(1) Notice of intention to demolish shall be provided to the Administrator at least 20 days prior to commencement of such demolition or anytime prior to commencement of demolition subject to paragraph (d)(4) of this section.

Such notice shall include the following information:

(i) Name of owner or operator.

(ii) Address of owner or operator.

(iii) Description of the building, structure, facility, or installation to be demolished.

(iv) Address or location of the building, structure, facility or installation.

(v) Scheduled starting and completion dates of demolition.

(vi) Method of demolition to be employed.

(vii) Procedures to be employed to meet the requirements of this paragraph.

(2) The following procedures shall be used to prevent emissions of particulate asbestos material to outside air:

(i) Friable asbestos materials, used to insulate or fireproof any boiler, pipe, or load-supporting structural member, shall be wetted and removed from any building, structure, facility, or installation subject to this paragraph before wrecking of load-supporting structural members is commenced. The friable asbestos debris shall be wetted adequately to insure that such debris remains wet during all stages of demolition and related handling operations.

(ii) No pipe or load-supporting structural member that is covered with friable asbestos insulating or fireproofing material shall be dropped or thrown to the ground from any building, structure, facility, or installation subject to this paragraph, but shall be carefully lowered or taken to ground level.

(iii) No friable asbestos debris shall be dropped or thrown to the ground from any building, structure, facility, or installation subject to this paragraph or from any floor to any floor below. For buildings, structures, facilities, or installations, 50 feet or greater in height, friable asbestos debris shall be transported to the ground via dust-tight chutes or containers.

(3) Sources subject to this paragraph are exempt from the requirements of §§ 61.05(a), 61.07, and 61.09.

(4) Any owner or operator of a demolition operation who intends to demolish a building, structure, facility, or installation to which the provisions of this paragraph would be applicable but which has been declared by proper State or local authority to be structurally unsound and which is in danger of imminent collapse is exempt from the requirements of this paragraph other than the reporting requirements specified by paragraph (d)(1) of this section and the wetting of friable asbestos debris as specified by paragraph (d)(3)(i) of this section.

(e) Spraying: There shall be no visible emissions to the outside air from the spray-on application of materials containing more than 1 percent asbestos, on a dry weight basis, used to insulate or fireproof equipment and machinery, except as provided in paragraph (f) of this section. Spray-on materials used to insulate or fireproof buildings, structures, pipes, and conduits shall contain less than 1 percent asbestos on a dry weight basis.

(1) Sources subject to this paragraph are exempt from the requirements of § 61.05(a), § 61.07, and § 61.09.

(2) Any owner or operator who intends to spray asbestos materials to insulate or fireproof buildings, structures, pipes, conduits, equipment, and machinery shall report such intention to the administrator at least 20 days prior to the commencement of the spraying operation. Such report shall include the following information:

(i) Name of owner or operator.

(ii) Address of owner or operator.

(iii) Location of spraying operation.

(iv) Procedures to be followed to meet the requirements of this paragraph.

(f) Rather than meet the no-visible-emission requirements of paragraphs (a), (c), and (e) of this section, an owner or operator may elect to use the methods specified by § 61.23 to clean emissions containing particulate asbestos material before such emissions escape to, or are vented to, the outside air.

Supreme Court, U. S.
FILED
MAR 15 1977
MICHAEL RODAK, JR., CLERK

No. 76-911

In the Supreme Court of the United States

OCTOBER TERM, 1976

ADAMO WRECKING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 545 F. 2d 1. The opinion of the district court (Pet. App. A12-A47) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1976. Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to December 31, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the special judicial review provisions of Section 307(b) of the Clean Air Act bar a defendant in a criminal

enforcement action from challenging the emission standard he is charged with violating.

STATUTE INVOLVED

Section 307(b) of the Clean Air Act, as added, 84 Stat. 1708, 42 U.S.C. 1857h-5(b), provides in pertinent part:

> (1) A petition for review of action of the Administrator in promulgating * * * any emission standard under section 112, * * * may be filed only in the United States Court of Appeals for the District of Columbia. * * * Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

STATEMENT

1. To carry out his duties under Section 112 of the Clean Air Act, as added, 42 U.S.C. 1857c-7, to protect the public health from hazardous air pollutants, the Administrator of the Environmental Protection Agency declared asbestos to be a "hazardous air pollutant" and promulgated emissions standards regulating the emissions of asbestos caused by a broad range of activities. See 40 C.F.R. 61.20-61.24, 38 Fed. Reg. 8829-8830.

One portion of these regulations established an emission standard applicable to the demolition of buildings and structures containing boilers, pipes, or structural members insulated or fireproofed with friable asbestos material. In addition to specific prior notification requirements, this emission standard provided (40 C.F.R. 61.22(d) (1973)):

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> (2) The following procedures shall be used to prevent emissions of particulate asbestos material to outside air:
>
> (i) Friable asbestos materials, used to insulate or fireproof any boiler, pipe, or load-supporting structural member, shall be wetted and removed from any building, structure, facility, or installation subject to this paragraph before wrecking of load-supporting structural members is commenced. The friable asbestos debris shall be wetted adequately to insure that such debris remains wet during all stages of demolition and related handling operations.

Although this emission standard could have been challenged in the United States Court of Appeals for the District of Columbia Circuit if the judicial review procedures specified in Section 307(b) of the Act had been properly invoked, this was not done. A petition for review filed by Dore Wrecking Company, in which the National Association of Demolition Contractors intervened, was dismissed by that court as untimely. *Dore Wrecking Co.* v. *Fri*, C.A. D.C., No. 73-1686, decided August 1, 1973.

2. One count of a two count superseding indictment returned in February 1975 in the United States District Court for the Eastern District of Michigan charged that petitioner:

> did knowingly cause the emission of asbestos from a four and one-half story commercial masonry building at the aforementioned location by failing to wet and remove firable [*sic*] asbestos material, used to insulate and fireproof a boiler in the basement of said building, before demolition of the load-supporting structural supports had begun: in violation of Title 42, United States Code, Section 1857c-7(c)(1)(B), and the

rules and regulations promulgated thereto, 38 F.R. 8829 (April 6, 1973), 40 C.F.R. §61.22(d)(2)(i).

Petitioner moved to dismiss this count, arguing that the regulation was invalid because Section 112 permits the Administrator to set only a numerical limit of permissible emissions, not to establish the "work practice" rules that had been promulgated. The United States supported the regulation on the merits and argued, as well, that Section 307(b) of the Act foreclosed petitioner's challenge to the validity of the emission standard.

The district court dismissed this count of the indictment, holding that Section 112 did not authorize the "work practice" standard (Pet. App. A34-A44). Responding to the contention that Section 307(b) barred the court from deciding the case on that basis, the district court characterized Section 307(b) as "highly ambiguous" and chose "to resolve doubts in favor of jurisdiction" (*id.* at A33).

The court of appeals reversed. The court discerned nothing vague or ambiguous in Section 307(b). The legislative history of Section 307(b) demonstrated that review had been placed in the District of Columbia Circuit to ensure "even and consistent national application" of the standards, and that the 30-day time limit for seeking review was designed "to maintain the integrity of the time sequences provided throughout the Act" (Pet. App. A10). The court pointed out that petitioner could have challenged the emission standard through the Section 307(b) procedure had it chosen to do so (*ibid.*). Therefore, the court concluded, petitioner could not challenge the standard in this criminal case.[1]

---

[1]Although the court of appeals did not pass upon the validity of the emission standard, it observed (Pet. App. A9 n. 2) that it saw:

> nothing inconsistent with the purposes of this statute in the Administrator's promulgation of a "work practice" as a condition of an emission standard which, absent fulfillment of the work practice conditions, otherwise prohibits any emission of particulate asbestos material into the ambient air.

ARGUMENT

The decision of the court of appeals is correct. This is the first appellate decision to pass upon the extent to which a defendant in a criminal case may attack the emission regulation he is alleged to have violated. Consequently, there is no conflict among the courts of appeals on the question presented here.[2] Although the question is potentially important, and might warrant review if a conflict were to arise, there is no reason for review of this decision.

In *Union Electric Co* v. *Environmental Protection Agency*, 427 U.S. 246, the Court held that (427 U.S. at 253; emphasis added):

---

[2]The question presented in this case is before the Fifth Circuit in a similar criminal enforcement action, *United States* v. *Big Chief, Inc.*, No. 76-3419. Petitioner's challenge to the "work practice" nature of the emission standard has been raised, belatedly, in petitions to review amendments to other portions of the asbestos emission standard for the demolition industry. *National Association of Demolition Contractors* v. *Train*, C.A. D.C., Nos. 74-1545 and 75-2078. The Administrator has argued in response to the petitions for review that the question cannot now be raised, because the time provided by Section 307(b) has lapsed and no grounds for the belated challenge have been offered.

In other contexts, courts of appeals have applied the requirements of Section 307(b) strictly, rejecting challenges that were not made at the right time or in the right court. See, *e.g.*, *Lubrizol Corp.* v. *Train*, C.A. 6, No. 76-1618, decided November 30, 1976; *Oljato Chapter of the Navajo Tribe* v. *Train*, 515 F. 2d 654, 661 (C.A. D.C.); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 512 F. 2d 1351, 1354-1356 (C.A. D.C.); *Granite City Steel Co.* v. *Environmental Protection Agency*, 501 F. 2d 925, 926 (C.A. 7); *Anaconda Co.* v. *Ruckelshaus*, 482 F. 2d 1301, 1304-1305 (C.A. 10); *Getty Oil Co. (Eastern Operations)* v. *Ruckelshaus*, 467 F. 2d 349, 359 (C.A. 3), certiorari denied, 409 U.S. 1125. See also *Sun Enterprises, Ltd.* v. *Train*, 532 F. 2d 280, 287 (C.A. 2) (parallel provision under Federal Water Pollution Control Act).

> Section 307(b)(1) allows petitions for review to be filed in *an appropriate court of appeals more than 30 days after the Administrator's approval* of an implementation plan *only if* the petition is "based solely on grounds arising after such 30th day."[3]

The Court further held that any new "grounds" must be grounds that, if known by the Administrator before acting, would have made it an abuse of discretion to have issued the regulation or standard in question (427 U.S. at 256).

Petitioner, in its attack on the emission standard, meets none of Section 307(b)'s requirements. It raises the lack-of-statutory-authority argument out of time, in the wrong court, in an action for enforcement; it does not even contend that it presents new "grounds" that could not have been presented in the time Congress allotted. Litigation of the issue petitioner now raises in this criminal enforcement proceeding is barred by Congress' command in Section 307(b)(2) that:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

An exclusive and time-restricted review provision simply means that, once the time for challenge has passed, regulations become final and have the force of the statute itself. Nothing in such a procedure offends the Constitution. *Yakus* v. *United States*, 321 U.S. 414. *Yakus* is on all fours with the present case. The Court held in *Yakus* that price

---

[3]Review of the Administrator's approval or promulgation of an implementation plan must be sought in the court of appeals "for the appropriate circuit" under Section 307(b). The 30-day time limit for petitioning and the restriction upon later review still apply.

control regulations may constitutionally be made the subject of an exclusive review proceeding, and that if the special review proceeding affords those affected "a reasonable opportunity to be heard" (321 U.S. at 433), Congress may bar a defendant in a criminal case from attacking regulations that could have been attacked in the special review proceeding.

In *Yakus*, as here, it was sufficient that petitioners had not followed the available avenue for review or established that the prescribed procedures would have been inadequate to protect their rights. Cf. *Califano* v. *Sanders*, No. 75-1443, decided February 23, 1977, slip op. 8-9 (courts must respect congressional decisions to confine judicial review to particular times and courts). Petitioner bypassed the review proceeding available under the Clean Air Act, and its neglect is not a sufficient reason to allow it to make its arguments belatedly in this criminal case.[4]

---

[4]*Leedom* v. *Kyne*, 358 U.S. 184, does not support petitioner. *Leedom* interpreted the ambiguous requirement of a "final" order (29 U.S.C. 160(f)) in favor of prompt review. The Court concluded that to deny any review there would create a statutory right without a legal remedy. 358 U.S. at 190-191. There is a remedy specifically provided by Section 307(b)(1) in this case, however; petitioner is foreclosed from challenging the regulations by congressional design and its own neglect, not by any legislative ambiguity or inadvertence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1977.

DOJ-1977-03

Supreme Court, U. S.
FILED
MAY 19 1977
MICHAEL RODAK, JR., CLERK

APPENDIX.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-911

ADAMO WRECKING CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 31, 1976
CERTIORARI GRANTED APRIL 4, 1977.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-911.

ADAMO WRECKING CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
For the Eastern District of Michigan
Southern Division

Criminal Docket 5-80297

Title of Case

THE UNITED STATES

vs.

ADAMO WRECKING COMPANY

Vio: Title 42, USC, Section 1857c-7(c)(1)(B) and Title 42, USC, Section 1857c-8(c)(2) (failing to wet and remove firable [*sic*] asbestos material used to insu;ate [*sic*] boiler before demolition)

Date	Proceedings
1975	
Feb. 20	Superseding indictment (no warrants requested).
March 11	Deft.'s motion to dismiss superseding indictment. BA.
•	• • • • •
June 6	Memorandum opinion and order granting deft.'s motion to dismiss Count I and holding a decision as to Count II in abeyance, filed and entered. Pratt, J.
•	• • • • •
July 3	Notice of appeal, with proof of service.
•	• • • • •
1976	
Dec. 2	Mandate from CCA reversing the judgment of the District Court and remanding the case for further proceedings with opinion. DD 12/3/76.

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Appeal from Eastern District of Michigan, S. D., at Detroit
Case No. 75-1967

• • • • •

No. Below: Criminal 75-80297.
Judge Below: Pratt.
Date of Judgment: June 6, 1975.
Notice of Appeal Filed: July 3, 1975.

• • • • •

Date	Filing-Proceedings
1975	
July 14	Copy Notice of Appeal.
•	• • • •
1976	
•	• • • •
Nov. 1	Judgment of the District Court reversed and case remanded (No costs taxed)
Nov. 1	Opinion by Edwards, J.
•	• • • •
Dec. 1	Mandate issued (No costs taxed).
Dec. 1	Opinion with mandate.
1977	
Jan. 16	Notice of filing petition for certiorari 12/31/76 (Sup. Ct. No. 76-911).
March 11	Certified copy of order of Supreme Court granting certiorari 4/4/77.

UNITED STATES DISTRICT COURT
Eastern District of Michigan
Southern Division

UNITED STATES OF AMERICA, *Plaintiff.* *vs.* ADAMO WRECKING COMPANY, *Defendant.*	Criminal No. 5-80297 Vio: 42 USC 1857c-7(c)(1)(B) 42 USC 1857c-8(C)(2)

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

Count One

On or about the 19th day of February, 1974, at 2612 Carter Street, also know as 8751 Linwood Street, in the City of Detroit, County of Wayne, within the Eastern District of Michigan, Adamo Wrecking Company, the defendant herein did knowingly cause the emission of asbestos from a four and one-half story commercial masonry building at the aforementioned location by failing to wet and remove firable [*sic*] asbestos material, used to insulate and fireproof a boiler in the basement of said building, before demolition of the load-supporting structural supports had begun; in violation of Title 42, United States Code, Section 1857c-7(c)(1)(B), and the rules and regulations promulgated thereto, 38 F. R. 8829 (April 6, 1973), 40 C. F. R. § 61.22(d)(2)(i).

Count Two

On or about December 26, 1973, at Detroit, within the Eastern District of Michigan, the Adamo Wrecking Company knowingly did make and cause to be made false and fictitious material statements and representations in a report to Mr. Francis T. Mayo, Regional Administrator, Region V. United States En-

vironmental Protection Agency, to wit: Adamo Wrecking Company stated and represented that a building located at 2612 Carter Street, also known as 8751 Linwood Street, did not contain firable [*sic*] asbestos materials, whereas in truth and in fact, as Adamo then knew, said building did contain such materials, all in violation of Title 42, United States Code, Section 1857c-8(c)(2), and the rules and regulations promulgated pursuant thereto, 38 F. R. 8829 (April 6, 1973), 40 C. F. R. § 61.22 (d)(1).

THIS IS A TRUE BILL

Foreman

RALPH B. GUY, JR.
United States Attorney

PETER J. KELLEY
Assistant U. S. Attorney

Dated: 2/20/75

UNITED STATES OF AMERICA
United States District Court
For the Eastern District of Michigan
Southern Division

UNITED STATES OF AMERICA, *Plaintiff,*	Indictment No. 5-80297
vs.	Vio: 42 USC 1857c-7(c)(1)(B)
ADAMO WRECKING COMPANY, *Defendant.*	42 USC 1857c-8(c)(2)

MOTION TO DISMISS SUPERSEDING INDICTMENT

Now Comes defendant, Adamo Wrecking Company, by and through its attorneys, and moves this Court to dismiss Counts I and II of the Superseding Indictment herein, stating as follows:

As to Counts I and II

1. The Indictment does not charge an offense against the United States for the reason that it omits an essential element of the criminal offense; to wit the emission of pollutants in violation of an emission standard required by the said act.

2. The Indictment does not charge an offense against the United States for the reason that the regulations promulgated pursuant to 42 USC § 1857c-7; to wit, 40 CFR § 61.22(d) do not constitute a standard for the emission of friable asbestos as required by statute.

3. The Indictment does not charge an offense against the United States for the reason that the Government neither has any evidence of friable asbestos emissions in violation of the statutory standard nor can it produce any such evidence at trial due to the absence of a standard for said emissions.

4. The Defendant is informed and believes that the government has not and will not be able to produce evidence of any "emission" whatsoever and the Indictment should therefore be dismissed.

5. The Indictment is unconstitutionally vague, ambiguous and indefinite and does not apprise defendant of the charges against it with sufficient specificity so that the defendant can adequately prepare to defend or determine what charge was made or intended by the Grand Jury in that:

(a) the Indictment purports to charge defendant with a violation of 40 CFR § 61.22(d), yet said regulation represents a work practice rather than a standard for the emission of friable asbestos as required by statute;

(b) the Indictment alleges a violation of § 1857c-7 but fails to specify which subsection thereof has been violated;

(c) the various terms, explanations, practices, and determinations required by 40 CFR § 61.22(d) are so vague that men of common intelligence must guess as to their meaning and would differ as to their application.

6. The Indictment does not charge an offense against the United States in that the Administrator exceeded his statutory authority in promulgating the regulations invoked in the Indictment.

7. The Indictment does not charge an offense against the United States because the Administrator failed to promulgate an emission standard for friable absestos as required by 42 USC § 1857c-7(b)(1)(B).

8. The Indictment does not charge an offense against the United States for the reason that the regulation purportedly promulgated pursuant to 42 USC § 1857c-7 represents an unauthorized dictate of the method by which buildings are to be demolished.

WHEREFORE, defendant Adamo Wrecking Company, prays that this Court dismiss Counts I and II of the Superseding Indictment.

As to Count II Only:

1. The Indictment does not charge an offense against the United States for the reason that the alleged violation of 42 USC § 1857c-8(c)(1)(2) is a nullity since there could exist no knowing failure to report something which is unconstitutionally vague, ambiguous, and indefinite.

WHEREFORE, defendant Adamo Wrecking Company, prays that this Court dismiss Count II of the Superseding Indictment.

Respectfully submitted,

DICKINSON, WRIGHT, MCKEAN & CUDLIP

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NOTATIONS INDICATING LOCATION IN PETITION OF OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit may be found at pages A1 through A11, inclusive, of the petition.

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Michigan, Southern Division, may be found at pages A12 through A47, inclusive, of the petition.

Supreme Court, U. S.
FILED
MAY 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-911

ADAMO WRECKING CO.,
Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONER.

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IN THE

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Sixth Circuit (Pet. App. A1-A11) is reported at 545 F. 2d 1. The opinion of the District Court (Pet. App. A12-A47) is unreported.

JURISDICTION.

This is a proceeding on writ of certiorari to review a decision of the United States Court of Appeals for the Sixth Circuit. Jurisdiction is conferred upon this Court by 28 U. S. C. § 1254 (1). The judgment of the Sixth Circuit was entered on November 1, 1976. On November 24, 1976 (No. A-426), Mr. Justice Stewart extended the time for filing the petition to and including December 31, 1976, on which date the petition was filed.

STATUTES AND REGULATIONS.

The case involves Sections 112, 113(c)(1)(C) and 307(b) of the Clean Air Act, as amended. These sections are codified as 42 U. S. C. §§ 1857c-7, 1857c-8(c)(1)(C), and 1857h-5 (b), respectively. They are officially published at 84 Stat. 1685, 1687 and 1708, respectively, and provide as follows:

"Sec. 112.(a) For purposes of this section:

(1) The term 'hazardous air pollutant' means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(2) The term 'new source' means a stationary source the construction or modification of which is commenced after the Administrator proposes regulations under this section establishing an emission standard which will be applicable to such source.

(3) The terms 'stationary source', 'modification', 'owner or operator' and 'existing source' shall have the same meaning as such terms have under section 111(a).

(b)(1)(A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section.

(B) Within 180 days after the inclusion of any air pollutant in such list, the Administrator shall publish proposed regulations establishing emission standards for such pollutant together with a notice of a public hearing within 30 days. Not later than 180 days after such publication, the Administrator shall prescribe an emission standard for such pollutant, unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant. The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant.

(C) Any emission standard established pursuant to this section shall become effective upon promulgation.

(2) The Administrator shall, from time to time, issue information on pollution control techniques for air pollutants subject to the provisions of this section.

(c)(1) After the effective date of any emission standard under this section—

(A) no person may construct any new source or modify any existing source which, in the Administrator's judgment, will emit an air pollutant to which standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and

(B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(i) such standard shall not apply until 90 days after its effective date, and

(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(2) The President may exempt any stationary source from compliance with paragraph (1) for a period of not more than two years if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security. An exemption under this paragraph may be extended for one or more additional periods, each period not to exceed two years. The President shall make a report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(d)(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing emission standards for hazardous air pollutants for sta-

tionary sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to stationary sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section.

* * * * *

Sec. 113(c)(1) Any person who knowingly—

* * * * *

(C) violates section 111(e), section 112(c) or section 119(g) shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be a fine of not more than $50,000 per day of violation or by imprisonment for not more than two years, or by both.

* * * * *

Sec. 307(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202 (b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

This case also involves the following regulation promulgated on April 6, 1973,* by the Administrator of the Environmental Protection Agency, 40 C. F. R. § 61.22(d); 38 Fed. Reg. 8820 *et seq.*:

"§ 61.22 Emission Standard.

* * * * *

(d) Demolition: Any owner or operator of a demolition operation who intends to demolish any institutional, commercial, or industrial building (including apartment buildings having more than four dwelling units), structure, facility, installation, or portion thereof which contains any boiler, pipe, or load-supporting structural member that is insulated or fireproofed with friable asbestos material shall comply with the requirements set forth in this paragraph.

(1) Notice of intention to demolish shall be provided to the Administrator at least 20 days prior to commencement of such demolition or anytime prior to commencement of demolition subject to paragraph (d)(4) of this section.

Such notice shall include the following information:

(i) Name of owner or operator.

(ii) Address of owner or operator.

(iii) Description of the building, structure, facility, or installation to be demolished.

(iv) Address or location of the building, structure, facility, or installation.

(v) Scheduled starting and completion dates of demolition.

(vi) Method of demolition to be employed.

---

* The regulation has subsequently been amended in respects not here material.

(vii) Procedures to be employed to meet the requirements of this paragraph.

(2) The following procedures shall be used to prevent emissions of particulate asbestos material to outside air:

(i) Friable asbestos materials, used to insulate or fireproof any boiler, pipe, or load-supporting structural member, shall be wetted and removed from any building, structure, facility, or installation subject to this paragraph before wrecking of load-supporting structural members is commenced. The friable asbestos debris shall be wetted adequately to insure that such debris remains wet during all stages of demolition and related handling operations.

(ii) No pipe or load-supporting structural member that is covered with friable asbestos insulating or fireproofing material shall be dropped or thrown to the ground from any building, structure, facility, or installation subject to this paragraph, but shall be carefully lowered or taken to ground level.

(iii) No friable asbestos debris shall be dropped or thrown to the ground from any building, structure, facility, or installation subject to this paragraph or from any floor to any floor below. For buildings, structures, facilities, or installations, 50 feet or greater in height, friable asbestos debris shall be transported to the ground via dust-tight chutes or containers.

(3) Sources subject to this paragraph are exempt from the requirements of §§ 61.05(a), 61.07, and 61.09.

(4) Any owner or operator of a demolition operation who intends to demolish a building, structure, facility, or installation to which the provisions of this paragraph would be applicable but which has been declared by proper State or local authority to be structurally unsound and which is in danger of imminent collapse is exempt from the requirements of this paragraph other than the reporting requirements specified by paragraph (d)(1) of this section and the

wetting of friable asbestos debris as specified by paragraph (d)(3)(i) of this section."

QUESTIONS PRESENTED.

1. Whether the Federal Courts are compelled to enforce the illegal and unauthorized directives of the Administrator of the United States Environmental Protection Agency?

2. Whether the Federal Courts are compelled to convict citizens for conduct which Congress has not made a crime?

STATEMENT OF THE CASE.

On February 20, 1975, a United States Grand Jury for the Eastern District of Michigan returned a two-count superseding indictment (A. 3), charging petitioner with violating criminal provisions of the Clean Air Act, as amended ("the Act" hereinafter), while demolishing a building in Detroit. On petitioner's motion (A. 5), the District Court dismissed the first count before trial for failure to allege an offense against the laws of the United States (A. 1).* The Government appealed (A. 1, 2), and the Sixth Circuit reversed and remanded for trial (A. 1, 2). This Court granted certiorari to review the Sixth Circuit's decision.

The indictment** charged violation of Section 112(c) of the Act, 42 U. S. C. § 1857c-7(c), criminal penalties for which are provided by Section 113, 42 U. S. C. § 1857c-8(c). Section 112(c), in pertinent part, provides:

> "(1) After the effective date of any emission standard under this section—
>
> * * * * *

* The trial court also ruled that disposition of the second count would require presentation of the facts (Pet. App. A. 46-47). Further proceedings on that count have been stayed by the trial court pending final disposition of this case.

** Since the case before this Court involves only the first count, it will be referred to herein for convenience as "the indictment."

> (B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard. . . ."

The regulation which petitioner was accused of violating bears the title "Emission Standard", but actually specifies a work practice or methodology to be followed in demolishing buildings containing friable asbestos materials:

> "Friable asbestos materials . . . shall be wetted and removed . . . before wrecking of load-supporting structural members is commenced. . . ." 40 C. F. R. § 61.22(d)(2)(i).

The theory of petitioner's motion to dismiss was that, notwithstanding its title, the regulation is not in substance an emission standard within the meaning of Section 112(c) which prohibits an emission in violation of an emission standard (the charge against petitioner). The Government took a contrary position on the merits, and also argued that the trial court was precluded from deciding whether the regulation is an emission standard because it is so entitled and because Section 307(b)(2) of the Act, 42 U. S. C. § 1857h-5(b)(2), provides:

> "Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

The District Court noted (Pet. App. A30-32) that petitioner was not seeking to raise any factual issues or to question the Administrator's wisdom, judgment or expertise, but rather contended that the regulation on its face is not an emission standard (Pet. App. A34). The trial court held that Section 307(b)(2) did not preclude him from deciding that pure question of law.

The trial court then analyzed the legislative history and the Act as a whole (Pet. App. A36-40), concluding (Pet. App. A40) that Congress had clearly created a statutory scheme by which emission standards were to set quantitative limits on

permissible emissions and were to be implemented by techniques for controlling emission. Accordingly, he held that an emission standard cannot be the same thing as a mere technique for controlling emissions (Pet. App. A40). Since petitioner was accused of violating a regulation which only mandated a technique for emission control, the District Court ruled that petitioner was not charged with violating an "emission standard" within the meaning of Section 112 of the Act. He therefore dismissed the indictment for failure to charge an offense against the laws of the United States (Pet. App. A44).

The Sixth Circuit reversed (Pet. App. A11), noting (*Id.*, at A10) that the demolition work practice rule could have been but was not brought before the District of Columbia Circuit by petition for statutory review filed within thirty days, pursuant to Section 307(b)(1), 42 U. S. C. § 1857h-5(b)(1). The Court held that Section 307(b)(2) prevented the trial court from examining the substance of the regulation to ascertain whether it is an emission standard within the meaning of the statute making it a crime to violate an emission standard. In the Court of Appeals' view, if the Administrator issues a regulation titled "Emission Standard" and if no petition to review is filed in the District of Columbia Circuit within thirty days, the District Courts have no choice but to enforce the regulation in a criminal proceeding regardless of its substantive content.

The Sixth Circuit did not decide whether the regulation is an emission standard within the meaning of the criminal provision, but remarked that it found no clear departure from statutory authority (Pet. App. A11). The Court ignored the explicit language of Section 112, which *requires* the Administrator to prescribe an emission standard for stationary sources and which does not under any circumstances authorize him to substitute a different kind of regulation, even though such alternative authority is provided in other sections of the Act dealing with other sources of emissions. See *Ethyl Corp.* v. *E. P. A.*, 541 F. 2d 1, 11 n. 14 (D. C. Cir. 1976), *cert. denied*, 426

U. S. 941 (1976). The Court of Appeals disregarded the Administration's repeated admissions that a work practice rule is not an "emission standard" within the meaning of Section 112.* Nor did the Sixth Circuit acknowledge the distinction between mandating an end product—quantitatively regulated emissions—and methods for achieving that end product (compare, *Ethyl Corp* v. *Environmental Protection Agency, supra*).

The Court of Appeals also noted (Pet. App. A9, n. 2) that it did not seem inconsistent with the purposes of the Act for the Administrator to make the work practice rule a basis for exemption from an otherwise applicable prohibition of any asbestos emissions. The Court did not comment upon Congress' explicit policy decision that the Administrator should not make judgments as to how stationary sources should be operated, but rather should only specify the results to be achieved and let the responsible business people determine how best to achieve them.** Further, the Court was apparently unaware that the Administrator had expressly disclaimed any intention to prohibit all asbestos emissions***, and that the District of Columbia Cir-

* In 1975, the Administration recommended amendment of Section 112 to authorize design or equipment standards when limitations upon measurement methodology make emission standards "infeasible". *Proposals submitted by the Ford Administration, January 30, 1975, to amend the Clean Air Act and the Energy Supply and Environmental Coordination Act*, 5 BNA Environmental Reporter, Current Developments, 1572, 1574 (Feb. 7, 1975).

By letter of March 22, 1974 (reprinted as the Addendum to this brief), EPA Administrator Train advised President of the Senate Ford:

"Although EPA can establish Federal Emission Standards . . . for sources emitting hazardous pollutants, there are occasions where emission limitations are not the most practical method of control. For example, emission standards are not appropriate in cases where emissions from a source are difficult to measure . . . EPA is requesting authority to set design or equipment standards for . . . hazardous pollutants whenever the limitations of measurement technology make emission limitations impracticable. . . ." (Addendum, p. A5).

** See S. Rep. No. 91-1196, at page 17 (91st Cong., 2d Sess., Sept. 17, 1970).

*** 38 Fed. Reg. 8820-1 (April 6, 1973).

cuit has held that the Administrator is not authorized to create exemptions from Clean Air Act regulations in addition to those specifically provided by statute.*

Petitioner submits that the Sixth Circuit's decision is clearly wrong. Accordingly, it should be reversed and this cause remanded with directions to reinstate the trial court's judgment.

ARGUMENT.

1. The Trial Court Properly Examined the Regulation on Its Face to Ascertain Whether It Is an Emission Standard.

The Administrator's authority to regulate emissions of asbestos and other hazardous air pollutants by stationary sources is contained in Section 112(b) of the Act, 42 U. S. C. § 1857c-7(b). That authority is *limited* to the prescription of an "emission standard", even though other sections of the Act explicitly confer flexibility in choosing among more than one type of regulation.** Thus, Congress clearly evidenced its intention that other types of regulations would *not* be used to control emissions of hazardous pollutants by stationary sources. In fact, Congress made a conscious policy decision that the Administrator should *not* undertake to dictate methods of operation to owners of stationary sources, S. Rep. No. 91-1196, at page 17 (91st Cong., 2d Sess., Sept. 17, 1970).

* *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 475 F. 2d 969, 970 (D. C. Cir. 1973).

** Thus, Section 110, 42 U. S. C. § 1857c-5, mentions a wide variety of regulations which might be contained in a plan to implement national ambient air quality standards, and Section 113(c)(1)(A), 42 U. S. C. § 1857c-8(c)(1)(A), makes it a crime to violate *any requirement* of an implementation plan. Similarly, the Administrator's primary emphasis on control of pollution by motor vehicles is to consist of emission standards, but Section 211(c), 42 U. S. C. § 1857f-6(c), confers alternative authority to regulate gasoline additives, under certain circumstances. See *Ethyl Corp.* v. *EPA*, 541 F. 2d 1 (D. C. Cir. 1976), *cert. denied*, 426 U. S. 941 (1976).

Moreover, Section 112(b) is more than merely permissive. Its subsection (1)(B) imposes upon the Administrator the *mandatory* obligation that he "*shall* prescribe an emission standard" (emphasis supplied). Thus, petitioner's contention that the work practice regulation is not an emission standard attacked the regulation on its face, not merely as exceeding the Administrator's authority, but indeed as embodying his own continuing violation of the mandatory duty to promulgate an emission standard.

The Sixth Circuit's holding that the District Court was precluded from entertaining this facial attack upon the regulation means that whenever unauthorized or illegal regulations are not challenged within thirty days, the District Courts have no alternative but to make private citizens criminals for conduct which Congress did not intend to make a crime and has not made a crime. Indeed, the effect of the Court of Appeals' decision is that the Federal Courts must enforce a regulation which embodies the Administrator's continuing violation of law.

The Court of Appeals relied principally upon this Court's decision in *Yakus* v. *United States*, 321 U. S. 414 (1944) (Pet. App. A8-9). In *Yakus*, this Court sustained the constitutionality of a withdrawal provision somewhat analogous to Section 307(b)(2) of the Act, and held that it precluded a criminal defendant from asserting the unconstitutionality of an OPA regulation as applied to the facts of that case. However, this Court explicitly *refrained from holding* that the withdrawal provision would operate to bar a defense that the regulation sought to be enforced was invalid on its face (321 U. S. at 446-7). Obviously, petitioner's contention that the demolition work practice regulation is not an emission standard was directed at the regulation *on its face*. Hence, *Yakus* cannot support the Court of Appeals' decision because the issue here is precisely the issue which this Court specifically declined to decide.

The proper reading of Section 307(b)(2) is indicated by *Leedom* v. *Kyne*, 358 U. S. 184 (1958), which held that the

illegal conduct of an administrative agency can be challenged before the Federal Courts independently of statutory review provisions. The rationale of that decision was that, in providing for statutory review, Congress does not contemplate facially unauthorized and illegal administrative action:

> ". . . *This suit is not one to 'review', in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction.* Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." (358 U. S. at 188.) (Emphasis supplied.)

In *Manges* v. *Camp*, 474 F. 2d 97 (5th Cir. 1973), the Court confronted a withdrawal provision at least as all-encompassing as Section 307(b)(2) of the Clean Air Act. The Comptroller of Currency had issued an allegedly unauthorized administrative order, but the aggrieved party had not sought review in the court nor within the time specified by the statutory review provision. The Fifth Circuit held that the withdrawal provision did not preclude an "out-of-time" attack on the order as being unauthorized on its face. Citing *Oestereich* v. *Selective Service System*, 393 U. S. 233 (1968), and *Breen* v. *Selective Service System*, 396 U. S. 460 (1970), the Fifth Circuit held:

> ". . . *if the Comptroller was not acting within his authority* granted by Congress, then 12 U. S. C. § 1818(i) [the withdrawal provision] could not withdraw jurisdiction." (474 F. 2d at 99.) (Emphasis supplied.)

These decisions should be controlling here. They stand for the proposition that the Federal Courts must not condone and enforce unauthorized and illegal administrative action, but rather must entertain challenges to such conduct, "withdrawal" provisions notwithstanding, lest our government by law be replaced by a government of men who ignore the law.

Petitioner was charged with knowingly violating an emission standard, made criminal by Sections 112(c)(1)(B) and 113(c)(1)(C). Petitioner claimed that the regulation it was

accused of violating was not an "emission standard" within the meaning of the criminal provisions. Petitioner claimed that the regulation, on its face, exceeded the scope of the Administrator's authority and represented a continuing violation of his statutory mandate to prescribe an emission standard. The Sixth Circuit was wrong to hold that petitioner could not defend on these grounds, that the Federal Courts are powerless to review the lawless conduct of an administrator and are compelled to enforce his unauthorized and illegal regulations. *Leedom* v. *Kyne, supra,* and *Manges* v. *Camp, supra,* stand squarely for the proposition that petitioner's facial attack upon the work practice regulation was properly raised before the trial court and that the Sixth Circuit's decision to the contrary was error and should be reversed.

2. The Trial Court Correctly Held That the Regulation Is Not an Emission Standard.

Upon consideration of the statute itself, the District Court recognized the obvious intent of Congress to approach the problem of air pollution through measurable standards which specify quantified levels of emissions, and the equally obvious statutory distinction between such emission standards, on the one hand, and methods or techniques of implementing them on the other.

The very section petitioner is accused of violating, Section 112(c), on its face contemplates that an emission standard and an emission control technique are two different things. Thus, the President's subsection (c)(2) authority to exempt a source from compliance with an emission standard upon finding, among other things, "that the *technology* to *implement* such standards is not available,"* is an obvious statutory contemplation that an emission standard is not the same thing as an emission control technique.

* 42 U. S. C. § 1857c-7(c)(2), emphasis supplied.

Section 112(b) requires the Administrator to prescribe an emission standard for each "hazardous" pollutant and *in addition* requires him to "issue information on pollution control techniques for air pollutants subject to the provisions of this section". These two subsections, read together, further indicate the clear distinction between emission standards and methods or techniques for controlling emissions.

The Act also provides for promulgation of emission standards for new motor vehicles and, as the trial court recognized, those provisions, too, indicate that emission standards must be different than the implementing techniques of controlling emissions. Thus, Section 202(b) of the Act, 42 U. S. C. § 1857f-1(b):

> in subsection (2), requires emission standards to be based on "measurement techniques";
>
> in subsection (4), requires EPA to report to Congress "with respect to the development of systems necessary to implement the emission standards established pursuant to this section"; and
>
> in subsection (5)(C), provides for a temporary suspension of an emission standard if "effective control technology, processes, operating methods, or other alternatives" are not available "to achieve compliance" with the standard.

An emission standard simply cannot be the same thing as a control technology, a process, an operating method, or any other technique of reducing or preventing emissions.

This distinction between an "emission standard" which specifies a result to be achieved and control technology which may be used to achieve the mandated result was recognized by the District of Columbia Circuit in *Ethyl Corp.* v. *Environmental Protection Agency,* 541 F. 2d 1, n. 14 at 11 (D. C. Cir. 1976), *cert. denied,* 426 U. S. 941 (1976). The District Court's view that an "emission standard" is to define the level of permitted emissions was foreshadowed by the Fifth Circuit's note that emission standards are *"specific quantitative limits* on the amounts given individual sources may emit into the air." *Natural Re-*

sources Defense Council, Inc. v. *Environmental Protection Agency*, 489 F. 2d 390, 394 n. 2 (5th Cir. 1974), reversed in part on other grounds, *sub nom. Train* v. *Natural Resources Defense Council*, 421 U. S. 60 (1974) (emphasis supplied). According to a study prepared for and supported by the National Science Foundation:

> "Emission standards specify the maximum legally permissible flow rates of certain pollutants from the emission source into the air." Grad, Rosenthal, et al., *The Automobile and the Regulation of its Impact on the Environment*, at page 12 (June 30, 1974).

Even the Agency and the Administration recognize that the work practice regulation sought to be enforced below is not an "emission standard" within the meaning of the Act. Thus, by letter of March 22, 1974 (reprinted in full text as the Addendum hereto), EPA Administrator Train transmitted proposed Clean Air Amendments to then-President of the Senate Ford, advising him, *inter alia:*

> "Although EPA can establish Federal emission standards . . . for sources emitting hazardous pollutants . . . *emission standards are not appropriate in cases where emissions from a source are difficult to measure*. . . ." at Addendum page A5. (Emphasis supplied.)

During the following year, the Administration again recommended Clean Air Amendments to Congress, including addition to Section 112(b) of explicit authority for the Administrator to prescribe a design or equipment standard instead of an emission standard:

> "If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible. . . ." 5 BNA Environmental Reporter, Current Developments, 1572 (Feb. 7, 1975).

As the trial court also noted, Congress did in fact prohibit violation of every kind of regulation which might be issued

under other sections of the Clean Air Act. Thus, implementation plans are promulgated under Section 110 of the Act, 42 U. S. C. § 1857c-5, and *it is a crime to knowingly violate any requirement* of an implementation plan under the circumstances specified in Section 113, 42 U. S. C. § 1857c-8(1)(A). The District Judge was clearly correct in drawing from this the negative inference that Section 112(c), 42 U. S. C. § 1857c-7(c)(1)(B), was only intended to prohibit a violation of the one kind of regulation named therein—an emission standard.

Congress' failure to make it a crime to violate any kind of Section 112 regulation in any way except by an emission in violation of an emission standard was not inadvertent. The House and Senate passed different versions of Clean Air Act amendments in 1970. The House passed H. R. 17255, in which form it would have covered all stationary source emissions in a single section, including provisions to the effect that the Administrator might require sources to use pollution control measures specified by him. The Senate, however, amended H. R. 17255 by *striking everything* except its number and enacting clause, substituting the provisions of a completely different bill.* Thus, while the Senate passed a bill designated H. R. 17255, *its provisions were those of S. 4358*, which dealt with stationary source emissions in three consecutive sections, *none of which provided that the Administrator might require a particular source to operate in the particular manner which he might consider best.*

In this respect, the view which prevailed in Conference, and which thereafter became law, was that of the Senate, not the House. Thus, Section 112 of the Act, like the Senate version, contains no provision suggesting that EPA might require sources to use pollution control measures of its selection. Accordingly, to find the rationale of this omission from the Act, one would seek the Senate's reason for amending H. R.

* Conf. Rep. No. 91-1783 (Dec. 17, 1970), reprinted in 3 U. S. Code Cong. & Adm. News 5356, 5374 (1970).

17255 as it did, and that reason may be found in the legislative history of S. 4358.

The first of the three stationary source sections of S. 4358 dealt with standards of performance and was the antecedent of what is now Section 111. A "standard of performance" is a "standard for emissions" and must be "achievable", Section 111(a)(1), 42 U. S. C. § 1857c-6(a)(1). It was the Senate's specific intent that the Administrator not make judgments as to the best methods of implementing standards, but rather that he should simply:

> ". . . determine the achievable limits and let the owner or operator determine the most economic, acceptable technique to apply." S. Rep. No. 91-1196, at page 17. (91st Cong., 2d Sess., September 17, 1970.)

Unlike a Section 111 standard of performance, a Section 112 emission standard for a "hazardous" pollutant need not be achievable, but is subject to Presidential exemption if it is not achievable by available implementing technology, Section 112(c)(2), 42 U. S. C. § 1857c-7(c)(2). The Senate's intention was patently the same here as with respect to standards of performance. The Administrator was to determine the emission levels which must be achieved, and each affected businessman was to decide how his own business could best achieve them.*

Congress' intent to regulate emissions of asbestos is not disputed in the abstract. However, the legislature did not intend to empower the Administrator to require stationary sources to operate in ways selected by him. For this reason, it is not a crime to violate in any way any kind of regulation which EPA might issue under Section 112. It is only a crime for an emission

* Even where the Administrator was authorized to issue different kinds of regulations in lieu of emission standards, the latter were given statutory preference because of the patent Congressional intent to minimize Agency interference with the normal prerogative of businessmen to run their own business. See *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F. 2d 1, 11 (D. C. Cir.), *cert. denied*, 426 U. S. 941 (1976).

to violate an emission standard. The indictment charging petitioner incurably failed to allege this essential element of the crime which Congress defined.

The Administrator may have issued the work practice rule instead of the emission standard required by Section 112 because he thought he knew more when he set out to implement the statute than Congress knew when it passed the law. If so, his wisdom in concluding that any asbestos emissions from demolition should be controlled by a regulation of work practices instead of by an emission standard, while not conceded by petitioner, is simply irrelevant. This Court has already held that an administrator's wisdom cannot justify putting citizens on trial for acts which Congress did not make criminal:

> "This case comes to us at a time in the Nation's history when there is greater concern than ever over pollution * * *. The crisis that we face in this respect would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions." *United States* v. *Standard Oil Co.*, 384 U. S. 224, 225 (1965).
>
> "Neither we [the Court] nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates should be improved upon." *United States* v. *Calamaro*, 354 U. S. 351, 357 (1957).

CONCLUSION.

The judgment of the Sixth Circuit should be reversed and the cause should be remanded with directions to reinstate the District Court's judgment dismissing Count I of the indictment.

Respectfully submitted,

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ADDENDUM TO BRIEF FOR PETITIONER.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D. C. 20510

Mar. 22, 1974
Office of the
Administrator

Dear Mr. President:

I am pleased to forward to you a proposed bill, "The Clean Air Act Amendments of 1974", which is designed to improve the Federal-State program to achieve clean air.

Air pollution directly affects all of our citizens because of the adverse effects on their health and welfare and because of the increased costs they pay for goods and services. The Clean Air Act Amendments of 1970 have established a strong and effective program to protect the American public from the adverse health effects as well as other effects of air pollution. Under the 1970 law EPA has established air quality standards to protect health and welfare. The States have adopted and are implementing detailed programs to ensure compliance with the standards. The automobile industry has made significant progress in reducing motor vehicle emissions. States and localities are developing transportation control strategies that will not only help achieve higher air quality, but also reduce congestion and provide more balanced transportation systems. These are only illustrative of the major progress that the law has stimulated.

Now, with more than three years of experience, we are in a position to suggest some specific areas in which the law needs to be strengthened or made more workable. The amendments which we are suggesting are intended to improve upon the basic thrust of the Act and to take into account new realities, particularly the energy problems which the Nation faces. They are also intended to deal realistically, but with continued firm

commitment, with specific problems of inability to achieve the statutory deadlines for the ambient air quality standards in severe problem areas such as Los Angeles.

The cornerstone of the Clean Air Act is the establishment of Air Quality Standards designed to protect the Nation's health and welfare and development by the States of implementation plans to insure attainment of those standards by designated statutory deadlines.

We are suggesting three changes dealing with the statutory deadlines for air quality standards; first, to provide greater flexibility in dealing with transportation controls for those areas heavily impacted by motor vehicle pollution; second, to provide for EPA review of State implementation plans in order to encourage the use of clean fuels in geographic areas of most need; and third, when necessary, to temporarily extend compliance dates for certain stationary source fuel limitations.

To date, transportation controls have been proposed for 38 metropolitan areas. Many of these communities can achieve the national photochemical oxidant and carbon monoxide ambient air quality standards by mid-1977 through the application of new motor vehicle emission standards, stringent stationary source standards and in some cases, additional control efforts, such as institution of inspection and maintenance programs and greater use of mass transit and car pools. A number of communities, however, are so heavily impacted by motor vehicle-related pollutants that severe gasoline rationing would be necessary to achieve air quality standards within the statutory deadline, even after all other control measures were instituted.

We are proposing that for those communities where attainment of standards by 1977 would cause serious economic and social disruption, EPA be authorized to allow up to five additional years for compliance with the air quality standards. EPA would grant this extra time only if all reasonable control measures under existing plans have been or will be instituted. EPA would be authorized to provide a further five-year extension in those cases where it would not be possible to achieve com-

pliance within the first five years. Providing additional time in appropriate cases will enable communities to attain the flexibility they need to develop the long-term transportation system solutions necessary to help meet air quality standards.

In developing implementation plans for sulfur oxides control, many States did not assess the aggregate impact of their regulatory requirements on available fuel supplies nationwide. Our projections indicate that there will be a shortage of low-sulfur content fuels as well as stack gas scrubbing technology, to meet the deadline in the Clean Air Act as required in State implementation plans.

In addition, we are proposing authority to permit EPA to issue enforcement orders beyond the statutory deadlines in the Act. In cases where the extension must be given to sources that have failed to make good faith efforts, EPA would be required to seek criminal or civil sanctions.

We are proposing a review of State implementation plans to identify State emission regulations that require the use of lower sulfur fuel than is needed to meet the primary air quality standards. Based on this review, EPA could issue enforcement orders through the amendment discussed above, to the extent necessary to eliminate the anticipated clean fuels deficit. This would complement EPA's current voluntary program of encouraging revisions of State implementation plans to ensure that limited clean fuel supplies are available where needed to meet health-related primary standards. Neither the current program nor the proposed amendment would infringe on the important principle that States have the prerogative to adopt and enforce more stringent controls if they choose to do so. Such revised schedules would ensure that the primary air quality standards would not be violated and that attainment of State and local standards will be achieved as soon as possible.

Enactment of this proposal would have the benefit of making scarce low-sulfur fuels and control hardware available first in urban areas where they are most needed, allowing for the alloca-

tion of low sulfur fuels and new technology in the most logical time sequence to meet our air quality objectives.

The Nation's energy supply problems have been exacerbated by greatly increasing demand which has resulted in dependence on foreign sources of crude oil. To reverse such dependence, it will be necessary for some oil burning power plants to convert to coal.

We are proposing both a short and long-term solution to deal with this problem. These proposals are similar to provisions contained in the recently vetoed Energy Emergency Act. One provision, virtually identical to that in the Energy Emergency Act, would provide authority for the President—through the Federal Energy Office—to mandate coal conversion. Accompanying this provision would be a limited exemption to the National Environmental Policy Act for such actions, which was also covered by the Energy Emergency Act. The exemptions would be for only one year and would require environmental analyses. The thrust of NEPA is protected since any long-term conversion would have to meet all the requirements of NEPA.

In cases where the Federal Energy Office has mandated coal conversion, the Administrator of EPA would have authority to temporarily suspend any emission standard or limitation in violation of primary air quality standards. Once the applicable deadline under the Clean Air Act is reached—either 1975 or 1977—the source would be required to achieve primary standards until June 20, 1980. At that time, the source would have to move beyond primary standards to the extent needed to achieve emission limitations in the original State implementation plan. The interim requirement to achieve primary standards is a departure we have flexibility in the application of sanctions. In many cases, the greater flexibility of civil penalties will be a much more effective mechanism to encourage compliance than criminal penalties; in other cases, criminal penalties will be more appropriate.

In his January 23, 1974, message to the Congress on measures to deal with the energy crisis, the President made his recommendation for extending auto emission standards. He stated this proposal would "permit auto manufacturers to concentrate greater attention on improving fuel economy while retaining a fixed target for lower emissions. These changes can be made without significant effect on our progress in improving air quality." The attached language would extend HC and CO standards at the 1975 interim level for 1976 and 1977 NOx standards at 3.1 grams per mile for the same two years.

The final item of our proposed legislation would extend the authorizing authorities of the Clean Air Act for two additional years. Last year, the Congress extended the Act's authorizations to June 30, 1974, at the Fiscal Year 1973 levels of $475 million. We are proposing extending the Act for the next two fiscal years at the $475 million level. This amount should be sufficient to carry forward the Nation's air pollution control program.

These above amendments have been discussed intensively throughout the Executive Branch and I support their enactment. There are, however, two proposals set forth in Attachments B and C which I do not support. Nonetheless, other Executive Branch agencies believe they are needed and I am therefore forwarding them for consideration by the Congress. These proposals concern "intermittent control systems" and "significant deterioration."

In support of the proposal permitting indefinite use of intermittent or alternative control systems, other agencies state that: (1) such systems will allow some utilities and industrial sources to meet ambient air quality standards at a cost significantly lower than the cost of continuous emission control systems and with a smaller energy penalty; (2) such systems involve less solid waste than some of the scrubber technologies; and (3) that use of such systems could encourage the coal industry to make greater investments in new mines. This proposal would permit the use of alternative or intermittent control measures indefinitely as long as they would meet national ambient air quality standards.

EPA's concern with intermittent control systems as a permanent control strategy rests heavily on information becoming increasingly available as to the effects on public health of the sulfates that are formed in the ambient air as a product of the sulfur oxide gaseous emissions. EPA studies indicate that measurable adverse health effects are present at ambient sulfate levels of 8-10 micrograms per cubic meter. These levels are exceeded in large parts of the country, particularly in the Midwest and Northeast. The permitting of uncontrolled emissions of sulfur dioxide except during periods of adverse meterological conditions would be expected to contribute in a major way in ambient air sulfate loadings. In my opinion, therefore, amending the Act to encourage indefinite or intermittent control systems would be highly inappropriate, and could be more costly in the long run should new requirements to deal with sulfates force expensive retrofits.

Recent court interpretation of the Clean Air Act requires the Administrator of EPA to establish standards to prevent "significant deterioration" of air already cleaner than required by national ambient air quality standards designed to protect public health and welfare. In support of this proposal other agencies state that the effect of this interpretation is to extend the Federal regulatory authority beyond standards set to protect the public health and welfare and to establish a new criterion, namely the quality in a given area at the time the Act was passed. They feel that his extension of the Federal regulatory authority will limit the range of choice of State and local governments in economic development and land use matters to a degree deemed unnecessary and unwarranted. This proposal would remove the authority of the Federal government to promulgate standards more stringent than those set to protect public health or welfare, but would not remove the authority of State and local governments to establish and maintain air quality standards cleaner than required by the Federal government should they choose to do so.

As a result of extensive written comments, public hearings and interagency discussions, EPA believes that meaningful steps can be taken to protect areas with already high air quality through classification by the States of geographic areas into one of three general classes:

(1) Air quality area better than secondary standards in which only restricted growth would take place;
(2) Air quality area better than secondary standard but in which moderate growth would be permitted;
(3) Air quality level to be determined by secondary standards.

The final classification of areas into these categories would take place after public hearings. No hard emission or air quality increments would be promulgated by EPA as limiting factors. Since the EPA regulation would not provide for firm maximum increments of pollution, it is expected that court challenges as to the adequacy of the EPA promulgation would take place.

Because of the potential for further litigation, the importance of this issue to our environmental and energy problems and the potential impact of EPA's regulations on State and local land use responsibilities, EPA believes that Congress should explore all alternatives for dealing with the significant deterioration issue in testimony and debate.

In closing, I would like to reiterate that significant progress has been made under the Clean Air Act. We look forward to early hearings and full Congressional debate on these proposals.

Sincerely yours,

/s/ RUSSELL E. TRAIN
Russell E. Train,
Administrator.

Honorable Gerald R. Ford
President of the Senate
Washington, D. C. 20510.

Supreme Court, U. S.
FILED
JUN 22 1977
MICHAEL RODAK, JR., CLERK

No. 76-911

In the Supreme Court of the United States

OCTOBER TERM, 1976

ADAMO WRECKING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76–911

ADAMO WRECKING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A11) is reported at 545 F.2d 1. The opinion of the district court (Pet. App. A12–A47) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1976. Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to December 31, 1976, and the petition was filed on that date. The petition was granted on April 4, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the special judicial review provisions of Section 307(b) of the Clean Air Act bar a defendant in a criminal enforcement action from challenging the statutory validity of the emission standard it is charged with violating.

STATUTES AND REGULATIONS INVOLVED

1. Section 307(b) of the Clean Air Act, as added, 84 Stat. 1708, 42 U.S.C. 1857h–5(b), provides in pertinent part:

> (1) A petition for review of action of the Administrator in promulgating * * * any emission standard under section 112, * * * may be filed only in the United States Court of Appeals for the District of Columbia. * * * Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.
>
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

2. Other pertinent statutory provisions and regulations are set out at Pet. Br. 2–7.

STATEMENT

1. To carry out his duties under Section 112 of the Clean Air Act, as added, 84 Stat. 1685, 42 U.S.C. 1857c–7, to protect the public health from hazardous

air pollutants, the Administrator of the Environmental Protection Agency declared asbestos to be a "hazardous air pollutant" and promulgated emission standards regulating the emissions of asbestos caused by a broad range of activities. See 40 C.F.R. 61.20–61.24, 38 Fed. Reg. 8829–8830.

One portion of these regulations established an emission standard applicable to the demolition of buildings and structures containing boilers, pipes, or structural members insulated or fireproofed with friable asbestos material. In addition to specific prior notification requirements, this emission standard provided (40 C.F.R. 61.22(d) (1973)):

> (2) The following procedures shall be used to prevent emissions of particulate asbestos material to outside air:
>
> (i) Friable asbestos materials, used to insulate or fireproof any boiler, pipe, or load-supporting structural member, shall be wetted and removed from any building, structure, facility, or installation subject to this paragraph before wrecking of load-supporting structural members is commenced. The friable asbestos debris shall be wetted adequately to insure that such debris remains wet during all stages of demolition and related handling operations.

Although petitioner could have challenged the emission standard by filing a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit, pursuant to Section 307(b) of

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the Act, petitioner did not seek judicial review. Indeed, the regulation effectively went unchallenged. A petition for review filed by Dore Wrecking Company, in which the National Association of Demolition Contractors intervened,[1] was dismissed as untimely. *Dore Wrecking Co.* v. *Fri,* C.A.D.C., No. 73–1686, decided August 1, 1973.

2. On December 18, 1973, the Regional Administrator for Region V of the Environmental Protection Agency issued an order under Section 113(a)(3) of the Act, 84 Stat. 1686, as amended, 42 U.S.C. (Supp. V) 1857c–8(a)(3), directing petitioner in all future demolitions of structures containing friable asbestos to comply with the regulation. Petitioner responded on December 26, 1973, that it would comply fully with the regulation.[2]

The Environmental Protection Agency later received information that petitioner had not complied with the regulation. An indictment returned on February 20, 1975, in the United States District Court for the Eastern District of Michigan charged (A. 3) that:

> On or about the 19th day of February, 1974, at 2612 Carter Street, also known as 8751 Linwood Street, in the City of Detroit, County of Wayne, within the Eastern District of Michigan, Adamo Wrecking Company, the defendant herein did knowingly cause the emission of asbestos from a four and one-half story commercial masonry building at the aforementioned location by failing to wet and remove firable [*sic*] asbestos material, used to insulate and fireproof a boiler in the basement of said building, before demolition of the load-supporting structural supports had begun; in violation of Title 42, United States Code, Section 1857c–7(c)(1)(B), and the rules and regulations promulgated thereto, 38 F.R. 8829 (April 6, 1973), 40 C.F.R. § 61.22(d)(2)(i).

[1] Petitioner is a member of the National Association of Demolition Contractors.

[2] Because the district court dismissed the indictment before trial, the compliance order and petitioner's response are not in the record. We have attached them as appendices A and B to this brief.

Petitioner moved to dismiss this count, arguing that the asbestos emission regulation it was charged with violating is invalid. The regulation directs that a certain procedure or "work practice" be followed in demolition of structures containing friable asbestos; petitioner maintained that the Administrator lacked the authority to issue a "work practice" rule and was required by Section 112 of the Clean Air Act to establish numerical maximum permissible asbestos release limits (Pet. App. A13).

The prosecutor both defended the validity of the regulation and asserted that Section 307(b)(2) of the Act precluded petitioner from raising the challenge to the regulation. The prosecutor contended that review of the regulation could have been had exclusively in the United States Court of Appeals for the District of Columbia Circuit on a petition for review filed either within 30 days of the promulgation of the regu-

lation or in that court thereafter if the petition were based solely on grounds arising after expiration of the 30-day period (Pet. App. A14).

During oral argument in the district court, petitioner conceded that it could have sought review of the regulation's validity in the District of Columbia Circuit, as Section 307(b)(1) provides.[3] The district court nevertheless considered petitioner's challenge to the regulation and dismissed the indictment (Pet. App. A12–A47). The district court characterized Section 307(b) as "highly ambiguous" and chose "to resolve doubts in favor of jurisdiction" (Pet. App. A33). The district court then held that the emissions control regulation was defective because Section 112 required the Administrator to set numerical limits rather than to prescribe procedures for curtailing emissions (Pet. App. A34–A44).[4]

The court of appeals reversed. The court discerned nothing vague or ambiguous in Section 307(b). The legislative history of Section 307(b) demonstrated that review had been placed exclusively in the District of Columbia Circuit to ensure "even and consistent national application" of the standards, and that the 30-day time limit for seeking review was de-

[3] See Court of Appeals App. 85.

[4] The district court did not dismiss Count II of the indictment, which charged petitioner with making false statements in certain required reports (Pet. App. A35 n. 31, A44–A47). Proceedings on Count II have been held in abeyance pending final resolution of petitioner's challenge to Count I.

signed "to maintain the integrity of the time sequences provided throughout the Act" (Pet. App. A10). The court pointed out that petitioner could have challenged the emission standard through the Section 307(b) procedure had it chosen to do so (*ibid.*). Therefore, the court concluded, petitioner could not challenge the standard in this criminal case.[5]

SUMMARY OF ARGUMENT

I

Section 307(b)(1) of the Clean Air Act provides that judicial review of national hazardous air pollutant emission standards may be sought in the District of Columbia Circuit by filing a petition within 30 days of the promulgation of such a standard. Section 307(b)(2) provides that "[a]ction of the Administrator with respect to which review *could have been* obtained under paragraph (1) shall not be subject to judicial review in civil *or criminal* proceedings for enforcement" (emphasis added). Section 307(b) was designed to permit prompt judicial review and assure uniform results throughout the Nation. If the court should invalidate any emission standard, the Administrator would be able to revise the regulations in

[5] Although the court of appeals did not pass upon the validity of the emission standard, it observed (Pet. App. A9 n. 2) that it saw "* * * nothing inconsistent with the purposes of this statute in the Administrator's promulgation of a 'work practice' as a condition of an emission standard which, absent fulfillment of the work practice conditions, otherwise prohibits any emission of particulate asbestos material into the ambient air."

time to achieve the congressional goal of clean air; if the court should uphold the standard, or if (as here) no timely petition for review were filed, the emission standard would be treated as if it were part of the statute itself, and the process of compliance could begin free from unequal regulation or lingering doubts about the need to comply.

We believe that Section 307(b) therefore should be construed in accord with its literal terms. It is a statute allocating judicial review to one particular court and limiting the time within which to seek review. The Court is familiar with such statutes, and it has applied them with full force. See, *e. g., Connor* v. *Waller,* 421 U.S. 656; *Yakus* v. *United States,* 321 U.S. 414.

The model for Section 307(b) was the Emergency Price Control Act upheld in *Yakus.* The Price Control Act gave the Emergency Court of Appeals "exclusive" jurisdiction of all non-constitutional challenges to price control regulations, just as the District of Columbia Circuit has exclusive jurisdiction of challenges to emission standards. The Court concluded (321 U.S. at 430–431) that the exclusivity provision barred any person from challenging the validity of a price control regulation as a defense in a criminal case, even though the statute had not, in terms, stated that challenge would be barred in criminal cases. The Court then upheld the statute, as so construed, against constitutional arguments.

This case presents no constitutional question. Petitioner does not contend that Section 307(b) is

unconstitutional, that it was unable to challenge the emission standard in the District of Columbia Circuit, or that the opportunity to present such a challenge is ineffective. The case therefore turns solely on the proper construction of Section 307(b), which is much more explicit than the statute considered in *Yakus.* The Court held in *Yakus* that a simple exclusivity provision foreclosed challenge to a regulation in a criminal case. In Section 307(b) Congress went beyond giving exclusive jurisdiction to the District of Columbia Circuit; it explicitly precluded subsequent challenges in any criminal proceeding. "[T]he statute expressly covers the situation" presented by this case, and the Court should "read it as it is written" (*Swain* v. *Pressley,* No. 75–811, decided March 22, 1977, slip op. 5, 6).

II

Because the court of appeals held that the regulation was not subject to challenge, it did not consider petitioner's contention that the emission standard is invalid. If the Court should disagree with our arguments concerning Section 307(b), however, then it should remand the case to the court of appeals to allow that court to consider petitioner's remaining arguments in the first instance.

If the Court reaches the validity of the asbestos emission standard, then it should uphold the Administrator's decision. Congress contemplated that airborne asbestos, an extremely hazardous pollutant, would be subject to rigid control. When it proved impractical to achieve reduction of emissions by setting numerical

maximum emission rules, the Administrator decided to issue regulations requiring demolition contractors to conduct their operations under conditions that are likely to hold emissions to a minimum. The alternative to this approach would have been to adopt a rule of "no visible emissions," which would have brought demolition work to a halt. Petitioner is not entitled to complain that the Administrator instead selected an effective method of control that is simple, relatively inexpensive, and does not require the demolition industry to go out of business.

ARGUMENT

I

THE DISTRICT COURT MAY NOT CONSIDER THE VALIDITY OF A REGULATION THAT WAS NOT REVIEWED BY THE PRESCRIBED PROCEDURE IN THE COURT OF APPEALS

A. CONGRESS REQUIRED EXPEDITIOUS RESOLUTION OF CHALLENGES IN A SINGLE FORUM

This case involves two important provisions of the Clean Air Amendments of 1970. The first is Section 112, 42 U.S.C. 1857c–7, which requires the Administrator of the Environmental Protection Agency to issue regulations of nationwide applicability controlling the emission of especially hazardous air pollutants. The second is Section 307(b), 42 U.S.C. 1857h–5(b), which determines the time and court for judicial review of the Administrator's actions.

The general plan of the Clean Air Amendments has been discussed by this Court in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, and *Union Electric Co.* v. *Environmental Protection Agency*, 427 U.S. 246. Congress required the Administrator to promulgate national "primary" and "secondary" air quality standards that were to be reviewed in the District of Columbia Circuit. Each State then was required to submit an implementation plan designed to achieve the primary air quality standards as expeditiously as possible, but ordinarily not later than three years after the date of approval of the implementation plan. Judicial review of the "local" issues raised by the implementation plans was placed in the courts of appeals having jurisdiction in the States involved in each plan. Variances from the plan are to be held to a minimum (*Train, supra*); and assertions that achievement of the plans' goals would be technologically infeasible are not a basis for attacking an implementation plan (*Union Electric Co., supra*).

Section 112 supplements this program by requiring the Administrator to restrict the emission of especially hazardous air pollutants from stationary sources. Section 112(a)(1) requires the Administrator to issue national emission standards with respect to any air pollutant that "may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." Congress instructed the Administrator to publish a list of hazardous air pollutants within 90 days from the effective date of the Act. Proposed regulations were to be published 180 days thereafter, and Section 112(b)(1)(B)

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required the Administrator to prescribe final emission standards not later than 180 days after initial publication. Private compliance was to take place immediately in the case of new sources and within 90 days for existing sources.[6]

Congress anticipated that asbestos would be one of the air pollutants controlled under Section 112.[7] The Administrator agreed that control of asbestos was appropriate. On March 29, 1971, the Administrator published an initial list of three hazardous air pollutants—asbestos, beryllium, and mercury (see 36 Fed. Reg. 5931). On December 7, 1971, the Administrator published proposed standards for asbestos (36 Fed. Reg. 23239). After extensive hearings and revisions in the regulations, the Administrator published the final regulations on April 6, 1973 (38 Fed. Reg. 8820).

This final promulgation of the regulations brought into play Section 307(b), the special judicial review provision of the Clean Air Amendments. Because the asbestos emission regulations applied nationwide, Section 307(b) directed that any judicial review be had in the District of Columbia Circuit.

Congress sought to ensure expeditious judicial review no less than expeditious administrative action and expeditious private compliance.[8] See S. Rep. No.

[6] Section 112(c) permits waivers and Presidential exemptions from this timetable under certain circumstances not relevant here.

[7] See, *e.g.*, S. Rep. No. 91–1196, 91st Cong., 2d Sess. 20 (1970).

[8] The Senate committee stressed (*ibid.*) that "the violation of a prohibition or emission standard for any substance which is hazardous to the health of persons requires an expeditious enforcement procedure."

91–1196, 91st Cong., 2d Sess. 41 (1970). Section 307(b)(1) therefore required any challenges to be filed within 30 days. And, in order to guarantee that the expeditious and uniform results produced by judicial review under Section 307(b)(1) would not be disturbed by subsequent attacks in other forums, Section 307(b)(2) provides that: "Action of the Administrator with respect to which review *could have been* obtained under paragraph (1) shall not be subject to judicial review in civil *or criminal* proceedings for enforcement" (emphasis added).

Section 307 originated in the Senate. The Senate committee explained that "[b]ecause many * * * administrative actions are national in scope and require even and consistent national application, * * * any review of such actions shall be in the United States Court of Appeals for the District of Columbia."[9] The committee considered a total preclusion of judicial review, but it instead decided to restrict all review to the single selected forum; the committee stated that "the bill would specifically provide for [any] review within controlled time periods" and that any later challenge could be raised only if "it is alleged that significant new information has become available."[10] That "new information" exception applies, however, only to information that, if known at the time of promulgation, would have made it an abuse of discretion for the Administrator to have acted as he did; in any other event, Section 307(b)(2) forecloses review

[9] S. Rep. No. 91–1196, *supra*, at 41.

[10] *Id.* at 41, 42.

altogether. See *Union Electric Co., supra*, 427 U.S. at 253, 256.

Petitioner has not attempted to bring itself within the "new information" exception to Section 307(b). Indeed, since petitioner is challenging the regulation on its face, no claim of "new information" would be tenable.[11] Petitioner has not contended that it was unable to obtain review of the asbestos regulation within 30 days in the District of Columbia Circuit; petitioner never filed a petition for review, and has offered no explanation for its failure to do so. Petitioner has not contended that the judicial review procedures specified by Section 307(b)(1) are inadequate or ineffective. Petitioner was in business as a demolition contractor in 1973, and it has not contended that it lacked notice of the fact that judicial review was available. The asbestos emission standards had been presaged by Congress in 1970 and had been proposed

[11] The Administrator has promulgated amendments to the asbestos emission standards. 40 Fed. Reg. 48292 (1975); 39 Fed. Reg. 15396 (1974). (See also 42 Fed. Reg. 12122, 12127 (1977), which do not involve building demolition.) These amendments have been challenged by a timely petition for review in the District of Columbia Circuit. *National Association of Demolition Contractors, Inc.* v. *Costle*, C.A.D.C., Nos. 74–1545 and 75–2078. Although the Association has argued that the emission standard for asbestos is unauthorized by Section 112, the Administrator has responded that this line of challenge is foreclosed by the failure to present new grounds that were unavailable in 1973. However that may be, *National Association of Demolition Contractors* could not affect the present case even if the District of Columbia Circuit were to hold that the asbestos emission standards are not authorized by Section 112; the original standards still would have been in effect in 1974, when petitioner demolished the building in question, and Section 307(b) would bar petitioner from raising the subsequent invalidation as a defense. See pages 16–26, *infra*.

in 1971; no one should have been surprised when they were promulgated in 1973. Petitioner does not contend that the limitation on judicial review in Section 307(b)(2) is unconstitutional.

In short, petitioner does not contend in any way that the judicial review procedures established by Congress are inadequate, ineffective, or unconstitutional. Petitioner simply argues that despite the plain language of Section 307(b)(2), it may collaterally attack the asbestos emission regulations in a criminal enforcement proceeding.

B. CHALLENGES THAT COULD HAVE BEEN RAISED IMMEDIATELY AFTER PROMULGATION OF EMISSION CONTROL REGULATIONS MAY NOT BE URGED IN DEFENSE OF CRIMINAL ENFORCEMENT PROCEEDINGS

Congress meant what it so plainly said in Section 307(b)(2). Without exception, the courts of appeals have concluded that challenges that could have been raised immediately after the promulgation of a regulation may not be raised belatedly.[12] All of these courts recognize that Section 307(b) requires prompt review in a single designated court. If that court should determine that the Administrator erred, he could correct

[12] *Lloyd A. Fry Roofing Co.* v. *United States Environmental Protection Agency*, C.A. 8, No. 76–1731, decided May 11, 1977; *Friends of the Earth* v. *Carey*, 552 F. 2d 25, 34–35 (C.A. 2), petition for a writ of certiorari pending, No. 76–1737; *Lubrizol Corp.* v. *Train*, 547 F. 2d 310 (C.A. 6); *City of Highland Park* v. *Train*, 519 F. 2d 681 (C.A. 7), certiorari denied, 424 U.S. 927; *Oljato Chapter of the Navajo Tribe* v. *Train*, 515 F. 2d 654, 661 (C.A.D.C.); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 512 F. 2d 1351 (C.A.D.C.); *Granite City Steel Co.* v. *Environmental Protection Agency*, 501 F. 2d 925 (C.A. 7); *Plan for Arcadia, Inc.* v. *Anita Associates*, 501 F. 2d 390, 392 (C.A. 9), certiorari denied, 419 U.S. 1034; *Anaconda Co.* v.

his mistake quickly and preserve the timetable for the achievement of clean air; if the designated court upheld the regulations, or if they were not challenged, they could be enforced, and obedience would take place free of any cloud upon the regulations' validity.

Section 307(b) allocates judicial review to one particular court and limits the time within which to seek review. This Court is familiar with such statutes, and it has routinely applied them with their full force. The Voting Rights Act of 1965 provides, for example, that before a new voting practice or procedure may take effect in a governmental unit covered by the Act, it must be found non-discriminatory in both purpose and effect in a declaratory judgment action brought in a three-judge district court in the District of Columbia (or, in the alternative, be cleared through submission to the Attorney General). The Court has upheld and enforced this provision on numerous occasions. See, *e.g.*, *United States* v. *Board of Supervisors*, No. 76–489, decided February 22, 1977; *Connor* v. *Waller*, 421 U.S. 656; *Perkins* v. *Matthews*, 400 U.S. 379, 383–385. Decisions of the Attorney General not to object to a new voting plan are not judicially reviewable (*Morris* v. *Gressette*, No. 75–1583, decided June 20, 1977), and decisions concerning the coverage of the Act are absolutely unreviewable (*Briscoe* v. *Bell*, No. 76–60, decided June 20, 1977).

Ruckelshaus, 482 F. 2d 1301, 1304–1305 (C.A. 10); *Getty Oil Co.* (*Eastern Operations*) v. *Ruckelshaus*, 467 F. 2d 349, 359 (C.A. 3), certiorari denied, 409 U.S. 1125. All of these have been civil cases. The instant case is the first involving a criminal enforcement action. The same question is pending, however, in *United States* v. *Big Chief, Inc.*, C.A. 5, No. 76–3419, which has been argued and is awaiting disposition.

Courts applying the parallel judicial review provision of the Federal Water Pollution Control Act also have held that review must be had promptly, in the court of appeals, or not at all. See *Sun Enterprises, Ltd.* v. *Train*, 532 F. 2d 280, 287 (C.A. 2); *E. I. duPont de Nemours and Co.* v. *Train*, 528 F. 2d 1136, 1137 and n. 1, 1142 (C.A. 4), affirmed on other grounds, No. 75–978, February 23, 1977; *Peabody Coal Co.* v. *Train*, 518 F. 2d 940 (C.A. 6).

In *Califano* v. *Sanders*, No. 75–1443, decided February 23, 1977, the Court dealt with a statute providing that judicial review of Social Security decisions could be had only immediately after the final decision by the administrative officials. A claimant sought judicial review after a reopening of his case had been denied, and the Court held that review was barred by the statute. It explained (slip op. 9) that an "interpretation that would allow a claimant judicial review simply by filing—and being denied—a petition to reopen his claim would frustrate the congressional purpose, * * *, to impose a 60-day limitation upon judicial review * * *. Congress' determination so to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall repetitive or belated litigation * * *. Our duty, of course, is to respect that choice."

Similarly, *Swain* v. *Pressley*, No. 75–811, decided March 22, 1977, dealt with a statute allocating to the District of Columbia courts the resolution of collateral attacks upon District of Columbia criminal convictions. The court of appeals had held that a defendant should have at least one opportunity for review in an

Article III court, but this Court disagreed. It found (slip op. 5) that "the statute expressly covers the situation" and held (*id.* at 6) that the courts must "read it as it is written."

Section 307(b)(2) implements a design Congress has used before. The model for Section 307(b) is the Emergency Price Control Act upheld in *Yakus* v. *United States,* 321 U.S. 414.[13]

The price control legislation addressed in *Yakus,* like the Clean Air Amendments, required rapid and unquestioning compliance. Review of price control regulations was centralized in the Emergency Court of Appeals under a statute giving that court "exclusive" jurisdiction of all non-constitutional challenges to price control regulations. The Court had no difficulty construing the statute as precluding any attack on a regulation in a criminal case (321 U.S. at 430–431), even though the statute did not explicitly mention criminal cases.

The difficult question presented in *Yakus* was one of constitutionality; petitioners there contended that the opportunity to obtain judicial review of administrative decisions in the Emergency Court of Appeals was inadequate, and that in any event Congress could not cut off defenses in a criminal case. These questions are not presented by the present case; petitioner does not argue that it lacked an adequate opportunity in 1973 to obtain review of the asbestos emission regulations, and it does not contend that Congress lacks the constitutional power to require courts to enforce regulations that have escaped earlier judicial review.

[13] Numerous other statutes contain similar restrictions on judicial review. See, *e.g.*, the Securities Exchange Act of 1934, 48 Stat. 901, as amended, 15 U.S.C. 78y; the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U.S.C. 45(c); the Federal Power Act, 49 Stat. 860, as added and amended, 16 U.S.C. 825*l*; the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. 1486(a); the Occupational Safety and Health Act, 84 Stat. 1602, 29 U.S.C. 660. See *Brennan* v. *Winters Battery Manufacturing Co.*, 531 F. 2d 317 (C.A. 6). certiorari denied *sub nom. Winters Battery Manufacturing Co.* v. *Usery*, 425 U.S. 991.

The Court's decision in *Yakus* demonstrates, however, that Section 307(b) is not open to serious constitutional question. The Court concluded (321 U.S. at 443) that Congress possesses ample power to "foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation" once a defendant has had an adequate opportunity to obtain review in a designated court with exclusive jurisdiction. Indeed, this Court pointed out that such bifurcated review is often advantageous to subjects of the regulation, since (*id.* at 444) "[u]nlike most penal statutes and regulations whose validity can be determined only by running the risk of violation, * * *, the present statute provide a mode of testing the validity of a regulation by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard * * *."

The statute at issue in *Yakus* was extraordinarily unyielding. Once a regulation had been promulgated,

review was required to be sought immediately; no statutory challenge to the regulation could be made thereafter for any reason. This could have produced harsh results where, as in *Yakus,* the regulation was attacked as applied to a particular set of facts, rather than on its face. The Clean Air Amendments, by contrast, give persons subject to the regulations much greater notice and opportunity to seek review.

First, the proposed regulations are published and become widely known through public hearings before they are finally issued. The delay between publication and promulgation gives interested parties ample time to study the proposals, to decide whether they would be aggrieved, and to prepare petitions for judicial review. They have 30 days after promulgation of the regulations within which to file petitions for review.[14]

Even if no petition for review is filed within 30 days, interested persons may obtain review if they can demonstrate new grounds arising after the 30th day; this provision ensures that changed circumstances will be taken into account and that no person will be denied judicial review of a regulation that has affected him in an unforeseeable way.

The concerns that led Congress to enact Section 307(b) are not unlike those that have led this Court to prohibit, in contempt proceedings, challenges to the validity of the underlying injunction. There is a time

[14] The petition need not be complex. It would be sufficient to set out in a single paragraph the general reasons for challenging a regulation.

to litigate and a time to comply. Once an air quality regulation, like an injunction, has gone unchallenged, the time for further protest has passed. "[E]ven though the constitutionality of the Act under which the injunction issued is challenged, disobedience * * * subjects the violator to contempt even though his constitutional claim might be later upheld." *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 439. See also *United States* v. *United Mine Workers,* 330 U.S. 258; *Walker* v. *City of Birmingham,* 388 U.S. 307. Congress did not attempt in Section 307(b) to preclude constitutional challenges or attacks upon the validity of the Clean Air Amendments. But it did provide that once 30 days have run, or once the regulations have been upheld on timely challenge, the time for dispute has passed. The district court must thereafter treat the regulations as if they were embodied in the statute itself.

Moreover, it is a familiar principle that when exhaustion of administrative remedies is required by statute, a defendant who neglects to exhaust may be precluded from challenging the validity of the administrative order in a criminal case. See *McGee* v. *United States,* 402 U.S. 479; *McKart* v. *United States,* 395 U.S. 185; *Falbo* v. *United States,* 320 U.S. 549. *McGee* held that if allowing all similarly situated persons to raise defenses for the first time in criminal proceedings would undermine the administrative apparatus, then the failure to exhaust administrative remedies would conclusively bar an attack on the ad-

ministrative order, even though no statute explicitly required such preclusion.[15]

It does not take much imagination to see that allowing all persons situated similarly to petitioner to attack the Administrator's regulations at this late date would undermine the adminisrative program. It would lead to disparate results in different courts, frustrating the intent of Congress to have a uniform national rule. It would delay the process of cleaning up the air by casting doubt upon the validity of outstanding regulations.

Petitioner does not discuss any of these principles. It relies instead on *Leedom* v. *Kyne,* 358 U. S. 184,

[15] See *Moore* v. *City of East Cleveland*, No. 75–6289, decided May 31, 1977, plurality slip op. 3 n. 5: Cases foreclosing nonconstitutional defenses in criminal prosecutions "did so pursuant to statutes that implicitly or explicitly mandated such a holding. * * * Because of the statutes the defendants were on notice that failure to pursue available administrative relief might result in forfeiture of a defense in an enforcement proceeding." Section 307(b)(2) put petitioner on notice that failure to seek prompt judicial review of the asbestos regulations would result in "forfeiture of a defense" in any later enforcement proceeding. See also Slip op. 9 (Burger, C.J., dissenting): "The applicability of the exhaustion principle to bar challenges to the legality of prosecutions is established, even where * * * substantial felony penalties are at stake."

See also *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 420–422, holding that when Congress has provided for review of administrative orders in the courts of appeals, that is the exclusive judicial remedy even in the absence of an express exclusivity provision. Any other rule would breed duplication, delay, and the application of conflicting standards. Cf. *Investment Company Institute* v. *Board of Governors*, 551 F. 2d 1270, 1278–1282 (C.A.D.C.).

for the proposition that administrative orders always are open to judicial review. *Leedom* does not support this proposition. *Leedom* considered the problem of judicial review under the National Labor Relations Act; the Court interpreted the ambiguous requirement of a "final" order as a precondition to judicial review (see 29 U.S.C. 160(f)) liberally in order to avoid the prospect that a concededly invalid administrative order would escape *any* opportunity for judicial review (358 U.S. at 190–191). *Leedom* does not stand for a broad principle of reviewability at all times and in all courts.[16] The Clean Air Amendments do not leave petitioner without a forum in which to obtain judicial review of the asbestos regulations; petitioner neglected the adequate opportunity for review under Section 307(b)(1). Petitioner's difficulties stem not from congressional oversight but from its own neglect. *Leedom* has nothing to do with the question whether a party that has failed to utilize an available and exclusive judicial remedy may subsequently raise its arguments as a defense in a criminal prosecution.

Petitioner also maintains that this case may be distinguished from *Yakus* because *Yakus* dealt with an attack upon a regulation as applied, whereas peti-

[16] See *Briscoe* v. *Bell*, *supra*, slip op. 9 n.13. This Court has explained on several occasions that *Leedom* turned upon the particular statute and facts presented by that case. See, *e.g.*, *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 480–482; *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Noncontract Employees*, 380 U.S. 650, 659–660.

tioner has attacked the regulation on its face. The distinction is insubstantial. Although the Court did not have occasion to deal in *Yakus* with a facial attack, other cases relied on *Yakus* to foreclose facial attacks. See *Bowles* v. *Willingham,* 321 U.S. 503, 521; *Case* v. *Bowles* 327 U.S. 92, 98; *Woods* v. *Hills,* 334 U.S. 210, 213–214.

If any distinction can be drawn between challenges to a regulation on its face and to a regulation as applied—and neither Section 307(b) nor its legislative history draws such a distinction—then preclusion of review is more, not less, appropriate when a regulation is attacked on its face. After all, facial defects are knowable the moment a regulation is promulgated. The consequences of a regulation as applied may be unknowable for some time, however; in *Yakus* itself the regulation was challenged only because it had the effect of requiring particular sellers to operate at a loss. If, as *Yakus* held, Congress may foreclose arguments that might have been difficult to anticipate and raise immediately, and that pertain to individual subjects of regulation, then surely Congress may foreclose arguments that appear at once on the face of the regulation and pertain equally to every subject of that regulation.[17]

[17] Petitioner contends (Br. 12) that *Yakus* refrained from holding that Congress could foreclose challenges to the facial validity of a regulation. The statement to which petitioner apparently refers (321 U.S. at 446–447) is: "We have no occasion to decide whether one charged with criminal violation of a duly promulgated price control regulation may defend on the ground that the regulation is *unconstitutional* on its face" (emphasis added). Petitioner does not contend that the asbestos emission standard is unconstitutional on its face; moreover, the reservation of that point in *Yakus* was attributable to the statute under consideration, which created concurrent jurisdiction to consider constitutional questions in the Emergency Court of Appeals and the enforcement courts (see 321 U.S. at 430–431). Nothing in the Clean Air Amendments or their legislative history indicates that Congress contemplated concurrent jurisdiction on any question, statutory or constitutional. Review of constitutional questions may be had under Section 307(b)(1) and consequently, under the terms of Section 307(b)(2), may not be had in enforcement actions. See *Lloyd A. Fry Roofing Co., supra; Friends of the Earth, supra.*

Another passage in *Yakus* states that the Court does not consider "whether one who is forced to trial and convicted of a violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid" (321 U.S. at 447). This passage refers to the possibility that a subject of regulation might seek timely judicial review in the proper and exclusive forum, then be put to trial before the court has passed upon the properly presented challenge. Petitioner, however, did not seek timely review of the asbestos regulation, and this case does not present whatever problems there may be in bringing a criminal prosecution before the District of Columbia Circuit has resolved a timely challenge to a nationwide emissions standard.

We submit that Section 307(b)(2) should be construed in accord with its literal terms. The statute preserves a full opportunity for judicial review at the proper time and in the proper court. Judicial review under Section 307(b)(1) enables persons affected by the regulations to know promptly whether the regulations are valid, and it enables the courts to detect any errors promptly so that attainment of the congressional goal of clean air will not needlessly be delayed. Section 307(b), by requiring parties to raise challenges promptly or not at all, imparts to the regulations a

necessary measure of authority so that competitive adjustments can be made and the need for adversarial enforcement can be held to a minimum. All affected parties will be subject to the same competitive conditions.[18] The judicial review provisions are a product of careful congressional design, and they preclude petitioner from raising in this case the defense that the asbestos emission standards are invalid.

II

SECTION 112 AUTHORIZES THE ADMINISTRATOR TO CONTROL EMISSIONS BY ISSUING LIMITATIONS UPON PERMISSIBLE WORK PRACTICES INSTEAD OF, OR IN ADDITION TO, NUMERICAL LIMITATIONS UPON EMISSIONS

We have argued above that petitioner is not entitled to defend this criminal proceeding by arguing that the asbestos emission regulations are invalid. If the Court agrees with this argument, it should affirm the judgment of the court of appeals. If the Court should conclude, however, that Section 307(b)(2) does not bar review in this case of the asbestos regulations, then it should vacate the judgment of the court of

[18] Enterprises have an important interest in the assurance that none of their competitors will be subject to less costly regulations. This interest also leads them to take a hand in enforcing the regulations. In *United States* v. *Big Chief, Inc.*, 7 E.R.C. 1840(E.D. La.), appeal pending, C.A. 5, No 76-3419, one of the prosecution's important witnesses was an unsuccessful bidder for a demolition contract. In preparing his bid, he had considered the costs of complying with the asbestos emission standard, and he suspected that the prevailing bidder had not. He visited the demolition site to observe whether the prevailing contractor was complying with the regulation and discovered the lack of compliance.

appeals and remand for further consideration of petitioner's argument (Br. 14–19) that the asbestos regulations are not authorized by the statute. The court of appeals did not rule on this argument in light of its conclusion that Section 307(b)(2) precludes review of the regulations in this proceeding, and we submit that this Court should not consider their validity in advance of a decision by the court of appeals. Out of an abundance of caution, however, we present a brief survey of the arguments supporting the validity of the asbestos regulations.

We have discussed the structure and purpose of Section 112 at pages 11–12, *supra*. That Section requires the Administrator to prescribe regulations that provide an "ample margin of safety" to protect the public health from harm caused by the emissions of especially hazardous air pollutants. Airborne asbestos causes cancer and there is no known level of safe exposure (38 Fed. Reg. 8820).

Congress contemplated that the Administrator would regulate asbestos pursuant to Section 112.[19] But the Administrator faced formidable obstacles to effective regulation. Devices capable of measuring the concentration of asbestos in the air have been developed only recently, so that there is no way to know whether the amount present in the air has increased or decreased in recent years (38 Fed. Reg. 8820). More importantly, there is no known way to measure

[19] See note 7, *supra*. See also 116 Cong. Rec. 42381–42384 (1970) (statement of Senator Muskie, the bill's floor manager).

the amount of asbestos emitted from stationary sources (*ibid.*), and when buildings are being demolished there is no known way to capture or filter the asbestos that may be liberated from the insulation.

Numerical limitations on asbestos emissions from the demolition of buildings therefore would have been meaningless and unenforceable. Still, the Administrator was under an explicit congressional mandate to restrict the emission of asbestos. The Administrator therefore initially proposed to prohibit any activity that resulted in "visible" liberation of asbestos into the air (36 Fed. Reg. 23239, 23242). This approach was strongly criticized, however, because it would have forbidden "repair or demolition in many situations, since it would be impracticable, if not impossible, to do such work without creating visible emissions" (38 Fed. Reg. 8821). The Administrator therefore concluded that the best approach for demolition activities was to prohibit all emissions that were not held to a minimum by the use of "work practices" calculated to reduce emissions. The regulations required demolition contractors to wet and remove friable asbestos before demolishing the building, and to keep the building debris (which may contain additional asbestos) wet during demolition. The procedure is simple, effective, and relatively inexpensive.

The Administrator's actions are consistent with Section 112. That Section requires the Administrator to promulgate "emission standards," and it does not

specify whether the standards shall set numerical limitations or state work practices.[20]

Petitioner argues that "emission standards" may include only numerical limitations, because Section 112(b)(2) provides that the Administrator shall "issue information on pollution control techniques for air pollutants subject to the provisions of this section." This shows, petitioner argues, that Congress intended to draw a distinction between numerical limi-

[20] The interpretation of Section 112 that we urge here has been upheld by the district court in *United States* v. *Big Chief, Inc.*, *supra*. While erroneously reaching the merits in our view (see point I, *supra*), that court concluded (7 E.R.C. at 1842–1843) that "[t]here appears to be no justification for restrictively defining 'emission standard' so as to exclude standards such as this, which undeniably control the amount of ambient emissions. It is most significant that Congress elected not to limit the term to numerical standards." The district court rejected arguments based on an analogy to Sections 111, 202, and 211 of the amended Act, reasoning that each of those sections requires the Administrator to consider economic and technological difficulties in achieving reduction of pollution; Congress did not require the Administrator to consider cost or technological problems in setting standards under Section 112 for the reduction of the most hazardous pollutants.

One district court has suggested that Section 112 does not authorize the asbestos emission regulations. See *United States* v. *National Wrecking Co.*, N.D. Ill., No. 74 CR 755, decided December 20, 1974; *United States* v. *Nardi Wrecking Co.*, N.D. Ill., No. 74 CR 756, decided January 2, 1975; *United States* v. *Harvey Wrecking Co.*, N.D. Ill., No. 74 CR 758, decided January 7, 1975; *United States* v. *Brandenburg Demolition, Inc.*, N.D. Ill., No. 74 CR 757, decided January 31, 1975. In each case, however, the indictment was dismissed for failure to allege that asbestos was emitted as a result of the demolition, and the district court's brief remarks about Section 112 were *dicta*.

tations (which could be the subject of "emission standards") and "pollution control techniques" (which could not). The argument is excessively formalistic. The asbestos control regulations devised by the Administrator prohibit demolition altogether—which achieves zero emissions—unless the prescribed emission control practice is adopted. Congress was concerned not with the form of the regulation but with its results. Section 112 required the Administrator to do what was necessary to achieve a level of emissions "which in his judgment provides an ample margin of safety to protect the public health." The asbestos emission regulations do so in an entirely practical way.

The legislative history of Section 112 demonstrates that Congress authorized whatever manner of controls on hazardous air pollutants should prove necessary to protect the public health. The bill passed by the House directed the Administrator to promulgate regulations establishing "standards with respect to emissions" which were to provide that no new sources of hazardous air pollutants "shall be constructed or operated, except where (and subject to such conditions as he deems necessary and appropriate) the [Administrator] makes a specific exemption." H.R. 17255, 91st Cong., 2d Sess., Section 5 (1970).

The Senate amended the House bill, subjecting new stationary sources and hazardous air pollutants to

different programs of control.[21] It required the Administrator to publish a list of hazardous air pollutants, to propose a prohibition on emissions of such pollutants, and, after a public hearing, to promulgate the prohibition unless the hearing showed that less drastic measures would suffice. The Senate committee report emphasized that "there should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91–1196, *supra,* at 20.

The Conference Committee adopted the broad outlines of the Senate proposal, and the report of the conferees warned that polluters that were not able to comply with standards that would produce "an ample margin of safety to assure public health protection" would be subject to abatement actions. See H.R. Conf. Rep. No. 91–1783, 91st Cong., 2d Sess. 46 (1970).

None of the committee reports, and none of the floor debates, indicates that numerical emission limits are the only way that the Adminstrator could achieve the important objective of limiting the emission of especially hazardous pollutants. There would be no reason consistent with the statutory scheme for creating or implying such a restriction, especially when the only effective alternative to a work practice rule would be an absolute prohibition on the offending activity.

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[21] It is not necessary to discuss here the legislative history of the new stationary source rules, which were accepted by the House and became Section 111 of the amended Act.

To the extent there is any doubt about the meaning of the Amendments, this Court should defer to the consistent construction of them by the Administrator, who is charged with their superintendence. The Court has "accorded great deference to the Administrator's construction of the Clean Air Act." *Union Electric Co.* v. *Environmental Protection Agency, supra,* 427 U.S. at 256; see also *Train* v. *Natural Resources Defense Council, Inc., supra,* 421 U.S. at 75, 87. The Administrator's construction of Section 112 is consistent, reasonable, and necessary to fulfill the purpose of the Clean Air Amendments.[22]

[22] Petitioner apparently contends (Br. 16–17) that the Administrator's interpretation of Section 112 has not been consistent because, in 1974, Administrator Train asked the President to submit to Congress legislation that would explicitly authorize "work practice" rules of the sort involved here. It is not inconsistent, however, for an administrative agency to construe an ambiguous statute in a particular way while simultaneously seeking clarification from Congress. Cf. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170–171. As Administrator Train pointed out in a letter of February 3, 1975, to the Chairman of the Senate Committee on Public Works, the Agency was simply "requesting Congressional affirmation of [its] authority to set design, equipment, or practice standards under those sections where the limitations of measurement technology make an emission limitation approach infeasible or impractical." (The text of this letter is set out in Appendix C, *infra.*)

Congress has been sensitive to the Administrator's request. The Senate has passed a bill (S. 252) that would confirm the Agency's authority to establish work practices when necessary to limit emissions. The committee report (S. Rep. No. 95–127, 95th Cong., 1st Sess. 44 (1977)) states that: "Asbestos is an example which has been demonstrated as requiring other than a direct numerical limitation. * * * Work practice and other design characteristics may be the only means available for controlling such pollutants. * * * [The provisions of this bill] would fully authorize the present EPA regulations governing asbestos." See also 123 Cong. Rec. S9175 (daily ed., June 8, 1977) (statement of Senator Muskie). The House bill does not contain a similar clarifying amendment, and the bills have been sent to a conference committee. If a bill incorporating the Senate provision should be passed, it would provide additional support for our position that the asbestos emission regulations were authorized by the 1970 Amendments. Cf. *Califano* v. *Sanders, supra,* slip op. 5–8 (holding that a 1976 statute demonstrated that the Administrative Procedure Act had not been designed as a grant of federal jurisdiction). We will promptly advise the Court if a clarifying amendment is enacted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**
JAMES W. MOORMAN,
Acting Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
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General Counsel,
GERALD K. GLEASON,
Deputy Associate General Counsel,
RONALD S. NAVEEN,
Attorney,
Environmental Protection Agency.

JUNE 1977.

* The Solicitor General is disqualified in this case.

APPENDIX A

United States Environmental Protection Agency

Order No: EPA 5–74–A–2

In the Matter of Adamo Wrecking Company, 11805 Gratiot Avenue, Detroit, Michigan

Order

The following ORDER is issued this date pursuant to Section 113(a)(3) of the Clean Air Act, as amended, 42 U.S.C. § 1857 C–8(a)(3).

On October 24, 1973, a United States Environmental Protection Agency inspector visited a demolition operation conducted by Adamo Wrecking Company at 1701–07 Seward in Detroit, Michigan. The building being demolished was a four story brick apartment building containing more than four (4) units. While there, demolition procedures were observed and a sample of dry insulating material covering some piping was obtained.

This sample was scientifically analyzed and was found to contain friable chrysotile asbestos. That sample was taken from a section of insulated four inch pipe (approximate size) in the basement and on the southeast corner of the structure. Also, demolition procedures observed at the site were found to be contrary to the procedures detailed in regulations published in the April 6, 1973, *Federal Register* (38 F.R. 8829), specifically § 61.22(d)(2)(i). Further, no notice of intention to demolish was provided to the

United States Environmental Protection Agency as required by § 61.22(d)(2)(i).

Therefore, after a thorough investigation of all relevant facts, including the seriousness of the aforementioned violation of the regulations promulgated by the Administrator pursuant to § 112 of the Clean Air Act, as amended, and any good faith efforts to comply with said regulations, it has been determined that immediate compliance in accordance with the provisions hereinafter set forth is reasonable.

Ordered:

That the Adamo Wrecking Company, 11805 Gratiot Avenue, Detroit, Michigan, with regard to the demolition operation conducted by the company at 1701–07 Seward in Detroit, Michigan (if such operation is still in progress), and with regard to all future demolition operations conducted by the company and subject to the standards published in the April 6, 1973, *Federal Register* at page 8829; shall adhere to all applicable standards enumerated in the aforementioned *Federal Register,* and especially § 61.22(d)(2)(i) and § 61.22(d)(1), with one exception, that § 61.22(d)(1) shall be modified to required notice of intention to demolish to the United States Environmental Protection Agency only five (5) days prior to commencement of such demolition.

Dated 12/18/73.

FRANCIS T. MAYO,
Regional Administrator.

APPENDIX B

ADAMO WRECKING CO.,
Demolition engineers: Licensed, Bonded, Insured;
11805 Gratiot Ave., Telephone 372–4033—Member of:
Detroit Demolition Contractors Assn., Inc.
Detroit, Michigan 48213, December 26, 1973.

Attn: Mr. FRANCIS T. MAYO,
United States Environmental Protection Agency,
Region V,
One North Wacker Drive,
Chicago, Illinois 60606

DEAR SIRS: This will acknowledge receipt of your letter of December 18, 1973. Please be advised that a visible examination of the structure located at 1701–07 Seward, Detroit, Michigan had been made prior to commencement of demolition, and no Friable asbestos material was observed.

Needless to say, my company did not knowingly violate any of your regulations or orders. We deeply regret that a alleged violation was found to occur at the above site. It is our intention to fully comply with your rules and regulations as we know them.

In keeping with the spirit and letter of your rules and regulations, I am enclosing herewith a list of buildings, which should be in the process of demolition within the next thirty (30) days, and contemplated completion within ninety (90) days from the date hereof. To the best of our knowledge, there are no friable asbestos materials within said buildings. These structures are to be machine wrecked in accordance with the ordinances of the City of Detroit.

I trust that the above meets with the intent of your letter of December 18, 1973. However, if any further information or cooperation is desired, please do not hesitate to contact us as our intention is to give full cooperation to your agency.

Very truly yours,

ADAMO WRECKING COMPANY
Mr. JOHN T. ADAMO.

Owner: City of Detroit, Department of Public Works, Ninth Floor, Cadillac Tower, Detroit, Mich. 48226.

Demolition of Buildings Revenue Sharing Program, Group 73–1 (RS). Contract No. PW–6263.

2909 Blaine	4 Story Brick—60 X 75 feet
2200–16 Brush	3 Story Masonry—90 X 100 feet
3207 Blaine	3½ Story Brick—70 X 100 feet
2612 Carter (8751 Linwood)	4½ Story Commercial Masonry—100 X 110 feet
8745 Dumbarton	4½ Story Brick—115 X 145 feet
2707–37 Gladstone	4 Story Masonry—80 X 170 feet
2670 Gladstone	3½ Story Masonry—90 X 125 feet
5415 Joy Road	5 Story Brick—80 X 100 feet
11842 LaSalle	3½ Story Brick—65 X 130 feet
7710–20 Lawton	2½ Story Masonry—70 X 90 feet
105–13 Smith	3 Story Masonry—60 X 110 feet

Owner: John T. Adamo & Paul Garavaglia, DBA/ Adamo Wrecking Company, 11805 Gratiot Avenue, Detroit, Michigan.

Dumbarton Park Apartments, 8550 Dumbarton, Detroit, Michigan. Project No. 044–44026.

APPENDIX C

LETTER FROM ENVIRONMENTAL PROTECTION AGENCY ADMINISTRATOR TO SENATE PUBLIC WORKS COMMITTEE CHAIRMAN SUPPORTING PROPOSED AMENDMENTS TO THE CLEAN AIR ACT DATED FEBRUARY 3, 1975

DEAR MR. CHAIRMAN: I would like to take this opportunity to express my support for the proposed amendments to the Clean Air Act submitted by the President on January 30, 1975, and briefly outline the Environmental Protection Agency's views on the need for their enactment. The environmental, energy and economic problems facing our society are interdependent and require complementary solutions and goals. I believe that the proposed amendments would reinforce our Nation's commitment to achieve and maintain air quality capable of protecting the health and welfare of our citizens while taking cognizance of the serious economic and energy-related problems which must be solved. The amendment addressing significant deterioration, however, is one of several possible approaches in dealing with this problem. Some of the proposed amendments are new, while others were submitted last year but failed to receive consideration.

* * * * *

4. New Source and Hazardous Emission Equipment Standards

The Environmental Protection Agency has prescribed a number of emission standards as Section 111 new source performance standards and Section 112

hazardous emission standards, and in a few instances, prescribed design, equipment, or operational standards under these sections where emission limitations are not practical. An example of the latter approach is the standard prescribing procedures on building demolition for the purpose of controlling emissions of asbestos to the atmosphere. We are requesting Congressional affirmation of our authority to set design, equipment, or practice standards under those sections where the limitations of measurement technology make an emission limitation approach infeasible or impractical. This authority would be used only in exceptional situations and would be subject to public participation under existing law. The amendment also directs the Administrator to consider non-air quality environmental impacts and energy requirements in setting standards of performance.

* * * * *

Sincerely yours,

/s/RUSSELL E. TRAIN,
Administrator.

Honorable JENNINGS RANDOLPH,
Chairman,
Committee on Public Works,
United States Senate,
Washington, D.C. 20510

U.S. GOVERNMENT PRINTING OFFICE: 1977

FOR ARGUMENT

No. 76-911

Supreme Court, U. S.
FILED
AUG 30 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

ADAMO WRECKING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ADAMO WRECKING CO., PETITIONER

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

On August 7, 1977, the President signed the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685. These amendments make it clear that the Administrator of the Environmental Protection Agency has the authority to control hazardous air pollutants by promulgating work practice standards as well as by issuing numerical limitations upon emissions.[1] Section 110 of the amendments provides:

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[1]Section 305(c) of the amendments also makes some changes in Section 307(b) of the Act, which governs judicial review. Section 305(c)(3) extends from 30 to 60 days the time within which to seek review in the District of Columbia Circuit. These changes do not affect the present case.

Section 112 of the Clean Air Act is amended by adding the following new subsection at the end thereof:

"(e)(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in his judgment is adequate to protect the public health from such pollutant or pollutants with an ample margin of safety. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

"(2) For the purpose of this subsection, the phrase 'not feasible to prescribe or enforce an emission standard' means any situation in which the Administrator determines that (A) a hazardous pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

"(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions

of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

"(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it becomes feasible to promulgate and enforce such standard in such terms.".

We have discussed at pages 32-33 and note 22 of our brief the legislative history of this provision in the Senate. The Conference Committee added only a few comments (H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 131-132 (1977)):

HAZARDOUS DESIGN STANDARDS

House bill

No comparable provision.

Senate amendment

Amends section 112 of existing law to specify design, equipment, or operational standards for the control of a source of hazardous emissions, where an emission limitation is not possible or feasible to measure hazardous emissions or to capture them through appropriate devices for control.

Conference agreement

The House concurs in the Senate provision with an amendment to clarify that the Administrator may specify a hazardous design standard if the emission of hazardous pollutants through a conveyance designed to emit or capture such pollutants would be

inconsistent with any Federal, State or local law and minor clarifying modification in the language.

The language in this section with respect to technological or economic limitations defines what is not feasible only for purpose of prescription or enforcement by EPA.

For the reasons discussed in our main brief, we believe that the Administrator always has had the authority to use work practice standards when necessary to carry out the congressional mandate to reduce the emission of hazardous air pollutants. The amendments to Section 112 of the Act clarify (and in some ways restrict) the Administrator's authority.[2] We submit that they demonstrate that the work practice regulation that petitioner is charged to have violated was authorized by statute and that the indictment therefore is proper even if, contrary to our submission, the Court should conclude that petitioner's arguments are maintainable at this late date.

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[2]The amendments to Section 112 refer to "emission standards" and "work practices" as distinct methods of regulation. Petitioner may argue that this demonstrates that the original version of Section 112, which spoke only of "emission standards," could not have authorized the asbestos regulation. This argument would be incorrect. It was necessary in the amended statute to distinguish between work practices and numerical limits in order to clarify the circumstances under which the Administrator could promulgate work practice regulations. Nothing in the legislative history indicates that Congress supposed that the Administrator lacked the power to promulgate work practices prior to the recent amendment; the legislative history discussed at Br. 32-33 n. 22 looks in the contrary direction.

For these reasons, as well as the reasons discussed in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

AUGUST 1977.

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*The Solicitor General is disqualified in this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-911

ADAMO WRECKING CO.,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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STATEMENT.

The Government's brief is laced with assertions of facts outside the record, but reply to most is unnecessary. Petitioner is, however, constrained to point out that its challenge to the sufficiency of the indictment was raised, even before pleading, as a question of law. There was no presentation to, or resolution by the trial court of questions of fact. It was for this reason, not as a concession, that Petitioner did not contest below the adequacy and effectiveness of the statutory review afforded by Section 307(b)(1) of the Clean Air Act.

The Government's brief repeatedly asserts, as if it were a matter of undisputed fact, that the statutory remedy is adequate and effective. The record, however, does not support the Government's notion that EPA publications in the fine print of

the Federal Register, and the additional publicity, if any, associated with its public hearing procedures, resulted in actual notice to Petitioner and other demolition contractors within the 30 days provided for seeking statutory review of EPA's final regulation. Nor does the record suggest that Petitioner had any reason to search for an EPA regulation which might adversely affect it.

Since the adequacy and effectiveness of the statutory remedy against unlawful EPA action was not litigated below and is neither shown by the record nor conceded, Petitioner believes it is appropriate to assume that fact, but only *arguendo*. The argument which follows is presented on that limited assumption.

ARGUMENT.

The indictment (App. 1)[1] alleges that Petitioner demolished a building by a work practice other than the one mandated by an EPA regulation, and charges violation of Section 112 (c)(1)(B) of the Clean Air Act, as amended, 42 U. S. C. § 1857c-7(c)(1)(B).[2] Although the Government seeks an adjudication that Petitioner is a criminal for having violated this section of the Act, its brief completely ignores the section's provisions.

Section 112(c)(1)(B) prohibits violation of an "emission standard." The trial court held (Pet. App. A35-A44) that a work practice rule, such as EPA had promulgated, is not the same thing as an emission standard. He therefore found the indictment deficient, because violation of an "emission standard" is an explicit essential element of the offense.

1. For convenience, the term "indictment" denotes Count I of the superseding indictment, since neither Count II of that indictment nor any count of the original indictment are before the Court on this appeal.

2. A knowing violation of Section 112(c) is made criminal by Section 113(c)(1)(C) of the Act, 42 U. S. C. § 1857c-8(c)(1)(C).

Petitioner's opening brief demonstrates that the trial court was absolutely right to view an emission standard and a work practice rule as being two different things. Petitioner would now invite the Court's attention to the Government's Supplemental Memorandum advising of and commenting upon recent amendments to Section 112. Even the Government now admits (Supp. Memo. p. 4, n. 2), in so many words, that the recent amendments make it clear that work practices and emission standards are "distinct methods of regulation."

The parties are thus in complete agreement that an emission standard and a work practice are two distinct and different things. How then can it be said that Petitioner committed the crime of violating an "emission standard" by allegedly failing to follow a work practice?

There is no need to seek a further Court of Appeals opinion, as the Government seems to suggest at page 27 of its brief. The record is adequate to enable this Court to decide whether the indictment is legally sufficient. It should, therefore, decide that question in the interest of judicial economy. See, *Perkins* v. *Matthews*, 400 U. S. 379, 386-7 (1971).

The Government does not deny and cannot deny the trial court's jurisdiction to decide whether the indictment alleged the essential elements of the crime, and that is all the trial court did. In fact, he carefully refrained from holding the work practice rule invalid, noting that it ". . . may be duly authorized, but it is not [an emission] standard" (Pet. App. A41, n. 40). No case cited by the Government, and none of which Petitioner is aware holds that a withdrawal provision such as Section 307(b)(2), 42 U. S. C. § 1857h-5(b)(2), precludes a trial court from examining an administrative regulation on its face to ascertain whether it is the kind of regulation specified in a criminal statute. The Court of Appeals' decision amounts to a holding that the trial court was required to make Petitioner a

criminal for engaging in conduct which Congress did not make a crime. That decision is wrong, and should be reversed.

Furthermore, the Court of Appeals was wrong and the trial court was right, even if the trial court's ruling should be viewed as a form of judicial review. Section 307 of the Clean Air Act does not mean, and cannot mean, that the Environmental Protection Agency, by invoking the authority of Section 112, can order the citizens of this country to do *anything* it pleases on pain of criminal conviction, provided only that no one contests within 30 days.

As shown in Petitioner's opening brief, *Leedom* v. *Kyne*, 358 U. S. 184, 188 (1958), supports the proposition that the term "judicial review" in Section 307(b)(2) should be construed to mean judicial review of agency action which is at least facially within the scope of agency authority. Even the cases cited by the Government in its grudging discussion of *Leedom* recognize the continued vitality of its holding.

Manges v. *Camp*, 474 F. 2d 97, 99 (5th Cir. 1973), was completely ignored by the Court of Appeals, just as it is now completely ignored by the Government. However, it is squarely in point here. There the court held that a preclusive provision indistinguishable from Section 307(b)(2) did not foreclose a belated, "wrong court" attack upon a facially lawless agency order. Indeed, the only difference between *Manges* and this case is that here the trial court was called upon for affirmative criminal enforcement of the facially unauthorized agency order.

Hence, on the authority of both *Leedom* and *Manges*, the trial court's examination of the regulation was not precluded by Section 307(b)(2) of the Act.

To paraphrase the conclusion of note 4 of the Government's Supplemental Memorandum, prior to the recent amendment nothing in the legislative history of the Act suggested a Congressional belief that EPA was authorized by Section 112 to promulgate work practices instead of emission standards. The Government seems to suggest, at pages 26 to 32 of its brief, that

it was wise and beneficent for EPA to adopt the expedient of usurping authority to promulgate a work practice rule, instead of the emission standard Section 112 required, until such time as it could persuade Congress to amend the Act. If ours were a government of men, this position might have some merit. However, ours is a government of law, so the Government's position is unsound on its face.

CONCLUSION.

For each and all of the foregoing reasons, and those set forth in Petitioner's opening brief, the Court of Appeals' decision should be reversed, and the cause should be remanded with directions to reinstate and affirm the trial court's judgment.

Respectfully submitted,

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